92-744

No.

Supreme Court, U.S.
FILED
OCT 29 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under this Court's decisions in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), a court of appeals must exercise independent, *de novo* review of the Federal Trade Commission's finding that commercial speech is misleading and therefore unprotected by the First Amendment.

2. Whether the FTC may rely solely on its own reading of an advertisement in determining that an ad that is true on its face nonetheless conveys an implied misrepresentation to members of the public, or instead must base its determination on reliable extrinsic evidence of the public's understanding of the ad.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Kraft, Inc., states that its parent corporation is Kraft General Foods, Inc. The parent corporation of Kraft General Foods, Inc., is Philip Morris Companies, Inc. Kraft, Inc., has no subsidiaries (other than wholly owned subsidiaries).

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Fruit of the Loom, Inc. v. *Sara Lee Corp.*, 674 F. Supp. 1020 (S.D.N.Y. 1986) 21

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Upjohn Co. v. *American Home Prods. Corp.*, 598 F. Supp. 550 (S.D.N.Y. 1984) 21

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Miscellaneous:

Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 OR. L. REV. 561 (1983) 23, 24

Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 658 (1985) 24

Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3 28

Foltz, *The Media Business: Advertising; F.T.C. Signals Its Concerns Over Deceptive Campaigns*, N.Y. TIMES, Feb. 14, 1991, at D19 28

Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559 (1969) . . 23, 24

LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971) 23

Landler, Schiller & Smart, *Suddenly, Green Marketers Are Seeing Red Flags*, BUS. WK., Feb. 25, 1991, at 74 28

J.T. McCarthy, TRADEMARKS AND UNFAIR COMPETITION § 27:7 (2d ed. 1984) 21

Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964) 23

Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) 11, 16, 19

Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970) 19

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Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. (1991) 24, 26

Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977) 23

Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KAN. L. REV. 625 (1969) 23, 24

Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508 (1989) 21

Quinn, *FTC Is Back in Business of Weeding Out False Ads*, WASH. POST, Feb. 24, 1991, at H3 28

Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984) 20

Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273 (1988) 15, 25

Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991) 28

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PETITION FOR A WRIT OF CERTIORARI

Kraft, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 970 F.2d 311. The opinion of the Federal Trade Commission (FTC) (App., *infra*, 29a-78a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1992. App., *infra*, 79a-80a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech." Sections 5, 12, and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52, and 55) and Section 43(a) of the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) are reprinted at pages 81a-87a of the Appendix to this petition.

STATEMENT

This case involves the Federal Trade Commission's decision that petitioner Kraft, Inc., violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, by misrepresenting the amount of calcium in Kraft Singles American Pasteurized Process Cheese Food relative to the calcium content of five ounces of milk and of imitation cheese slices.[1] The FTC found that two sets of Kraft's advertisements for Singles -- the so-called "Skimp" and "Class Picture" ads -- falsely implied that each slice of Singles contains as much calcium as five ounces of milk. The Commission also found that the Skimp ads conveyed the false implication that each slice of Singles contains more calcium than a slice of imitation cheese.

The Commission based these findings on its own reading of the advertisements, without relying on any objective, extrinsic evidence of how consumers actually interpreted the ads. Accordingly, the FTC ordered Kraft to cease and desist from misrepresenting the amount of calcium or any other nutrient contained in any of its cheese, imitation cheese, or substitute cheese products. The Seventh Circuit, reviewing the FTC's decision under the deferential "substantial evidence" test, enforced the cease and desist order.

1. Kraft Singles and Imitation Cheese Slices

Kraft, Inc., produces and markets Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles"), which are individually wrapped slices of pasteurized process cheese food. App., *infra*, 33a. The Food and Drug Administration requires that pasteurized process cheese food contain at least 51% natural cheese. *Id.* at 34a n.2. Each slice of Singles contains about 68% natural cheese. *Ibid.* By contrast, imitation cheese slices contain little or no cheese but normally consist of water, vegetable oil, flavoring

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[1] Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Section 12 prohibits "false advertis[ing]." *Id.* § 52(a). Section 15 defines false advertising as advertising that is "misleading in a material respect." *Id.* § 55(a) (1). If an advertisement violates Section 12, it also violates Section 5. *Id.* § 52(b). See App., *infra*, 81a-86a.

agents, and fortifying ingredients. *Ibid.* Imitation slices are, by FDA definition, "nutritionally inferior" to pasteurized process cheese food slices. *Ibid.* Substitute cheese slices do not contain enough natural cheese to qualify as pasteurized process cheese slices, but are not nutritionally inferior to those slices. *Ibid.*[2]

In the early 1980s, makers of imitation slices began advertising their products as more nutritious and less expensive than dairy slices such as Singles. App., *infra*, 34a. Kraft responded by attempting, through its own ads, to inform consumers that Singles contain more milk than imitation slices. *Id.* at 33a-35a. The general theme of these ads was that each slice of Singles is made from five ounces of milk, whereas imitation slices use very little milk, but consist mostly of vegetable oil and water. *Id.* at 34a. Kraft sought to educate consumers that Singles cost more than imitation slices because Singles' ingredients are more expensive; it believed that consumers would be willing to pay a small premium to get a real dairy product. *Id.* at 34a-35a.

2. The Kraft Advertisements

As part of this advertising campaign, Kraft developed the two sets of ads at issue in this case, referred to collectively as the "Skimp" ads and the "Class Picture" ads. App., *infra*, 33a. The Skimp ads directly compared Singles to imitation slices on the basis of milk content. *Id.* at 35a. Those ads also referred to calcium as an example of the nutrients in Singles. *Ibid.* Kraft focused on calcium because consumer interest in it was increasing and because other products were being touted as good sources of calcium. *Ibid.*

The set of advertisements known as the Skimp ads actually consisted of many different ads, and each of the Skimp ads had several variations. The only ad the FTC discussed was the Skimp/Blue Eyes television commercial, which contained the following audio copy:

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy

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[2] Consistent with the FTC's and Seventh Circuit's usage, see App., *infra*, 2a, 34a n.2, we will refer to both imitation and substitute slices as "imitation slices" for purposes of this petition.

> KRAFT Singles. Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big KRAFT means. Good thing I do.
>
> *Singers*: KRAFT Singles. More milk makes 'em . . . more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

App., *infra*, 42a.

The visual image corresponding to the statement "Imitation slices use hardly any milk" showed a small amount of milk being poured into a glass. App., *infra*, 42a. As the voice-over said, "But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow," the glass continued to fill, up to a five ounce mark. *Ibid*. The commercial also showed milk pouring into a glass that gradually became part of a package of Singles, which bore the phrase "5 oz. milk slice" inside the image of a glass on the label. *Ibid*.

The Class Picture advertisements did not mention imitation slices, but emphasized Singles' milk content and promoted Singles as a good source of calcium (a fact not disputed by the Commission). App., *infra*, 35a. The ad on which the FTC focused, the Class Picture/5 ounce television commercial, depicted a group of school children having their class picture taken, and contained the following audio copy:

> *Announcer (voice over)*: Can you see what's missing in this picture? Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.
>
> *Photographer*: Say Cheese!
>
> *Kids*: Cheese!
>
> *Announcer (voice over)*: Say KRAFT Singles.

Id. at 49a. The Class Picture ads also contained a superscript stating that "[o]ne 3/4 ounce slice has 70% of the calcium of five ounces of milk." *Ibid.*

3. Kraft's Testing and Modifications of the Advertisements

Before disseminating the Skimp and Class Picture ads, Kraft had some of them "copy-tested" to determine what messages consumers would take from them and to measure consumer recall. Two consumer survey organizations, ASI Market Research (ASI) -- "the leading supplier of copy testing services in the nation" (ALJ op. 17) -- and Communication Workshop Inc. (CWI), tested the Class Picture/5 ounce commercial, and ASI tested the Skimp/Brown Eyes commercial (which was essentially the same as the Skimp/Blue Eyes commercial). *Id.* at 17-19. ASI and CWI used unaided open-ended questions to discover the messages consumers took away from the ads; such questions are standard practice in the advertising field. *Id.* at 17-19, 38. Officials from Kraft and Kraft's advertising agency reviewed the results of these tests and determined that consumers did not take away any false messages from the ads. *Id.* at 18-19.

Despite the results of Kraft's pre-dissemination testing, Kraft received a complaint from the Center for Science in the Public Interest (CSPI) claiming that the Skimp ads conveyed the message that a slice of Singles contains as much calcium and other nutrients as five ounces of milk. ALJ op. 19. That message, if actually conveyed by the ads, would be false because some of the nutrients of the five ounces of milk that go into each 3/4 ounce slice of Singles are lost during processing.

In response to the CSPI complaint, Kraft reexamined the results of its copy-testing and determined that the Skimp ads did not convey such a claim. ALJ op. 18. Nevertheless, Kraft decided to modify the Skimp ads by changing the clause "KRAFT *has* five ounces per slice" to "Kraft *is made from* five ounces per slice." App., *infra*, 4a. Kraft later made two additional changes. First, it changed the clause "so her little bones get calcium" to "plus her little bones get calcium." Tr. 1552-1553. Second, it added a superscript stating that "one 3/4 ounce slice has 70% of the calcium of five oz. of milk." App., *infra*, 4a.

Notwithstanding Kraft's efforts to ensure that the Skimp ads were not misleading, CSPI filed a complaint about the ads with the FTC. In January 1986, the FTC undertook an investigation of whether the Skimp ads conveyed misleading claims. ALJ op. 20.

Kraft then hired a third research organization, Opinion Research Corp. (ORC), to conduct yet another survey to determine whether the complaints about the Skimp ads had any merit. ALJ op. 40. The ORC survey was purposely designed to "obtain[] responses supporting the implications raised by [the FTC]" by specifically asking survey respondents whether the ads made any comparisons to other products. *Id.* at 41. Despite such questions, the ORC survey showed that an average of only 3% of survey respondents took away the implication that Singles contain as much calcium as five ounces of milk, and an average of only 6.3% took away the message that Singles contain more calcium than imitation slices. *Id.* at 42. The insignificant percentage of respondents that perceived the alleged claims buttressed Kraft's determination that the ads were not implicitly misleading. See *id.* at 71. Cf. App., *infra*, 41a (practice is deceptive if it misleads a "significant minority" of reasonable consumers); *Henri's Food Prods. Co.* v. *Kraft, Inc.*, 717 F.2d 352, 358-359 (7th Cir. 1983) (under Lanham Trade-Mark Act, survey showing that only 7.6% of respondents thought defendant's product was made by plaintiff supported finding of *no* likelihood of confusion).

Nevertheless, on June 17, 1987, the FTC, having broadened its investigation to include the Class Picture ads, issued a complaint charging that both sets of ads conveyed the misleading claims that (1) each slice of Singles contains as much calcium as five ounces of milk (the "milk equivalency" claim), and (2) each slice of Singles contains more calcium than an imitation slice (the "imitation superiority" claim). ALJ op. 1.

4. The FTC Proceedings

An administrative law judge found that both sets of ads conveyed both alleged claims. ALJ op. 62-70. First, the ALJ found that the language and visual elements of the Skimp/Brown Eyes television commercial "and [of] ads containing the same elements" were "likely to give reasonable consumers the net

impression of milk equivalency and imitation superiority." *Id.* at 64.

Second, the ALJ found that the alleged claims were false because a 3/4 ounce slice of Singles contains approximately 70% of the calcium of five ounces of milk, ALJ op. 48-49, and because most imitation slices have as much calcium as Singles. *Id.* at 51-52. He therefore ordered Kraft to cease and desist from making these claims about any of its individually wrapped slices of cheese or imitation cheese. *Id.* at 73-75.

The FTC affirmed the ALJ's finding of liability in significant part. App., *infra*, 29a, 37a, 70a. The Commission found that the Skimp ads conveyed both the milk equivalency and imitation superiority claims based on its own reading of the ads. *Id.* at 43a-46a, 51a. Referring to the Skimp/Blue Eyes television commercial, the Commission noted four elements that contributed to its finding that the ads conveyed the milk equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces per slice"; (2) "repetition of the precise amount of milk in a Kraft Single"; (3) the use of the word "so" to link the reference to milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to a five ounce mark, and the super-imposition of that image onto a package of Singles. *Id.* at 43a-44a.[3]

Two other elements led the Commission to find that the Skimp ads also conveyed the imitation superiority claim: (1) the "express reference to imitation slices" combined with "the use of comparative language ('hardly any,' 'but')"; and (2) "the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio portion refers to Kraft Singles." *Id.* at 51a.

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[3] The Commission also found that Kraft's modifications of the ads did not dispel the net impression of milk equivalency, although it discussed only the addition to the television commercial of the superscript stating that each slice of Singles contains 70% of the calcium of five ounces of milk. App., *infra*, 44a. The FTC stated that the superscript in the television commercial was ineffective because it appeared only briefly and amidst distracting audio and visual elements. *Ibid.*

Because it concluded that its own reading of the advertisements demonstrated the existence of both claims, the Commission found it "unnecessary * * * to resort to extrinsic evidence." App., *infra*, 45a. See also *id.* at 47a, 51a. The Commission merely noted that the "weight of the probative extrinsic evidence" was "consistent" with its determination as to both claims. *Ibid.*

The Commission then found that the Class Picture ads contained "copy elements substantially similar to the 'Skimp' ad elements that convey the impression of milk equivalence." *Id.* at 49a. The only such element that it mentioned, though, was the juxtaposition of the reference to five ounces of milk with the statement "so they're concentrated with calcium." *Ibid.* The Commission once more relied solely on its own reading of the ads in reaching its conclusion, but again noted in passing that the weight of the probative extrinsic evidence was consistent with its view. *Id.* at 50a & n.14.

The Commission held, however, that the Class Picture ads did not convey the imitation superiority claim because they did not expressly compare Singles to imitation slices or contain any visual cues that prompt a comparison. App., *infra*, 53a. It also found that the extrinsic evidence was insufficient to support a finding that the ads made the imitation superiority claim. *Id.* at 54a-55a.

Finally, the FTC greatly expanded the coverage of the ALJ's cease and desist order to include not just individually wrapped cheese and imitation cheese slices, but also *any* cheese or imitation cheese product. App., *infra*, 29a-30a, 65a.

5. The Court of Appeals' Decision

The Seventh Circuit (which had jurisdiction under 15 U.S.C. § 45(c) and (d)) enforced the FTC's cease and desist order. At the outset, the court held that it would review the FTC's findings that the ads were misleading under the "highly deferential, substantial evidence test." App., *infra*, 7a-9a. The court rejected Kraft's argument that this Court's decisions in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), required independent, *de novo* review of the Commission's findings because

those findings determined whether the ads were protected by the First Amendment. *Ibid.*

The court of appeals' decision on the standard of review rested on two grounds. First, the court held that *de novo* review is not applicable in commercial speech cases. Although acknowledging that this Court in *Peel* had applied *de novo* review to a restriction on commercial speech, the Seventh Circuit determined that this Court had not intended that courts should exercise *de novo* review in all commercial speech cases. App., *infra*, 8a. Second, the court of appeals distinguished *Bose* and *Peel* as involving review of *court* decisions and stated that the Commission is entitled to greater deference than courts because of its "expertise in the field of deceptive advertising." *Ibid.*

In addition, the court of appeals distinguished *Peel* as involving a "prophylactic regulation * * * completely prohibiting an entire category of potentially misleading commercial speech," whereas this case concerned "an individualized * * * cease and desist order, prohibiting a particular set of deceptive ads." App., *infra*, 9a. The court held that this distinction "justif[ied] differing levels of appellate review." *Ibid.*

On the merits, the Seventh Circuit held that it was permissible for the FTC to rely solely on its own reading of the advertisements to find that the ads, though truthful on their face, conveyed the misleading implications. App., *infra*, 13a. The court stated, however, that its "holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception." *Id.* at 16a. Nevertheless, the court felt constrained by precedent to uphold the FTC's practice of relying on its own reading of an ad in determining whether the ad is implicitly misleading.

In a concurring opinion, Judge Manion expressed his concern over the chilling effect the FTC's practice has on protected, nonmisleading commercial speech:

> [T]he FTC's current procedure threatens to chill nonmisleading, protected [commercial] speech. Although not all commercial speech has constitutional protection, the law

> has developed [to protect nonmisleading commercial speech] since this court decided that the FTC could rely on its own interpretation of ads[.] The Supreme Court has recognized that a free flow of information is indispensable to decision-making in the free enterprise system. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). But the FTC jeopardizes this flow by relying on the FTC commissioners' subjective interpretation to determine whether an ad, while literally true, implies a false message. Advertisers will be unable to predict whether the FTC will find particular ads misleading. Pre-dissemination surveys showing consumers *are not* misled will be useless since the FTC is free to ignore any such extrinsic evidence and rely on its subjective judgment that consumers *may* be misled. Advertisers unwilling to gamble with a multi-million dollar ad campaign have essentially two choices: (1) submit every campaign to the FTC in advance or (2) disseminate ads that say little or nothing about a product or service. An advertiser will not want to risk producing comparative ads which the FTC may ultimately find to imply false, unintended messages.

App., *infra*, 27a-28a. Nevertheless, Judge Manion agreed with the court that precedent foreclosed any challenge to the FTC's reliance on its own reading of an ad. *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

Under the approach approved by the court of appeals, the Federal Trade Commission may determine that an advertisement that is true on its face is nevertheless *implicitly* misleading based solely on the individual commissioners' reactions to the ad, without any need for reliable, objective evidence to support that reading. The commissioners' subjective interpretation is then given only the most perfunctory, deferential judicial review. The net effect of the Seventh Circuit's decision is to invest the FTC with virtually unchecked power to restrict speech on the basis of the commissioners' own subjective judgments.

The decision below warrants this Court's review for several reasons. First, the Seventh Circuit's decision on the applicable standard of review conflicts with the decisions of this Court and of several other circuits. Moreover, this issue is likely to recur with

great frequency, not only in FTC cases involving false advertising, but in all commercial speech cases and cases involving agency decisions restricting speech.

Second, the Commission's approach to interpreting advertisements under the FTC Act conflicts with the established procedure under the Lanham Act's virtually identical prohibition against false advertising, in which courts require objective evidence that a facially truthful ad is implicitly misleading. The FTC's approach also will have a substantial chilling effect on truthful, informative advertisements. This case therefore is of enormous importance to businesses that depend on advertisements to promote their products and services, as well as to consumers who rely on such advertisements in choosing among options in the marketplace.

Finally, the Seventh Circuit acknowledged these concerns but felt compelled by decisions of this Court to enforce the FTC's order. Only this Court can correct the court of appeals' misunderstanding of those decisions.

I. COURTS SHOULD APPLY *DE NOVO* REVIEW TO FTC DECISIONS HOLDING THAT COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

The first issue on which certiorari should be granted concerns the standard of review applicable to the FTC's decision that Kraft's advertisements conveyed misleading implications and therefore were unprotected by the First Amendment. That issue comprises two subsidiary questions: (1) whether the standard of independent, *de novo* review announced in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), is applicable to commercial speech cases; and (2) whether the *Bose* standard applies to judicial review of agency decisions that particular speech is unprotected.

The courts of appeals have reached conflicting conclusions on both of these questions. Both questions, moreover, are important and are likely to recur with great frequency. Accordingly, one distinguished commentator has observed that both of these questions require resolution by this Court. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 244 (1985) ("Sooner or later, the Supreme Court must confront a range of issues for which its *Bose* opinion provides little guidance. Quite obviously, the Court must

determine whether *Bose*'s independent judgment requirement applies to all first amendment claims, and it must also assess the significance of its reasoning for administrative agencies.").

Furthermore, the conflict in the circuits on these questions is sure to promote forum shopping in cases involving review of FTC false advertising decisions. Because such decisions are reviewable in any circuit in which the false advertising is alleged to occur or in which the advertiser resides or does business (see 15 U.S.C. § 45(c)), most FTC decisions may be appealed to any one of a large number of circuits. The prospect of such forum shopping emphasizes the need for certiorari.

A. *Bose* Applies to Commercial Speech Cases

In *Bose Corp.* v. *Consumers Union*, *supra*, this Court held that appellate courts have a constitutional responsibility to engage in nondeferential, "independent review" of the record in free speech cases to determine whether or not particular speech is protected by the First Amendment. 466 U.S. at 510-511. The specific issue in *Bose* was whether a defamatory statement about a "public figure" was made with actual malice, and was therefore unprotected. But the Court's discussion strongly suggested that independent appellate review is necessary *whenever* particular speech is alleged to fall within an "unprotected category" -- categories including not only defamation, but also "fighting words," incitement to riot, obscenity, child pornography, *and* false or misleading commercial speech. *Id.* at 504-511 & n.22. In such cases, independent review is required "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.[4]

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[4] See also *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) ("the reviewing court must '"examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect"'") (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946))).

Bose did not, however, specifically decide whether independent review is applicable to cases involving commercial speech. The uncertainty left by *Bose* has led to a conflict among the courts of appeals on this question.

Like the Seventh Circuit in this case, the D.C. Circuit has held that the *Bose* standard does not apply to commercial speech cases. *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (1985) (reviewing district court decision that advertisement was misleading). The Fifth and Eleventh Circuits, by contrast, have applied independent, *de novo* review in cases involving restrictions on commercial speech, citing *Bose* for support. *Lindsay* v. *City of San Antonio*, 821 F.2d 1103, 1108 & n.9, 1110 & n.11 (5th Cir. 1987) (ban on portable street signs), cert. denied, 484 U.S. 1010 (1988); *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 & n.11 (11th Cir. 1992) ("we subject to independent examination the jury's finding that [the advertiser's] ad would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes"); *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (ban on portable street signs), cert. denied, 485 U.S. 981 (1988).[5]

This Court appeared to answer the question whether independent review is applicable in commercial speech cases in *Peel* v. *Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), a case involving an issue quite similar to the one in this case. In *Peel*, the four-Justice plurality, citing *Bose*, explicitly stated that *de novo* review was required to determine whether an attorney's advertisement (consisting of a letterhead statement about his certification as a civil trial specialist) was misleading, and therefore unprotected, speech. *Id.* at 108. Justice

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[5] Moreover, the First and Third Circuits have held more broadly that *Bose*'s independent review standard applies in *all* First Amendment cases, including cases involving the Religion Clauses. *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940, 941-942 (1st Cir. 1989), cert. denied, 494 U.S. 1066 (1990); *Bender* v. *Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), vacated for lack of standing, 475 U.S. 534 (1986).

Marshall and Justice White, while not explicitly citing *Bose*, also clearly engaged in independent review in deciding that issue. *Id.* at 111-115 (Marshall, J., concurring in the judgment); *id.* at 118 (White, J., dissenting).

Perhaps because of the fractured nature of the opinions in *Peel*, however, that case has failed to resolve the split in the circuits. Thus, since *Peel*, the Seventh Circuit in this case and the Eleventh Circuit in *Braun* have reached opposite conclusions on the issue of *Bose*'s applicability to commercial speech cases. See also *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836, 843 (D.P.R. 1990) (interpreting *Bose* and *Peel* as requiring independent review of agency's determination that advertisement was misleading).

The Seventh Circuit's opinion itself reflects the continuing uncertainty in the lower courts on this issue and demonstrates the need for a dispositive statement by this Court. The court below acknowledged that "*Peel* arguably extended *de novo* review to * * * commercial advertising." App., *infra*, 8a. Nevertheless, it stated, without explanation, that it did "not think that the [Supreme] Court intended that result," and suggested that only this Court could resolve the question whether commercial speech cases warrant *de novo* review. *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989)). Review by this Court is therefore necessary to end the continuing confusion in the courts of appeals on this issue and to clarify the implications of *Bose* and *Peel* for commercial speech cases.

Moreover, review is especially warranted here because the Seventh Circuit's decision (as well as the D.C. Circuit's decision in *Brown & Williamson Tobacco Corp.*, on which the Seventh Circuit relied, see App., *infra*, 8a) is based on a clear misreading of *Bose*. In support of its holding that *de novo* review was inapplicable to this case, the Seventh Circuit stated that "*Bose* itself suggests that commercial speech might not warrant the higher standard of review established for libel cases." App., *infra*, 8a (citing 466 U.S. at 504 n.22). The *Bose* footnote cited by the Seventh Circuit, however, clearly does not stand for this proposition. In fact, it suggests the opposite.

The footnote is appended to a textual paragraph discussing the various categories of speech that are unprotected by the First Amendment. In the footnote, the Court explained why false and misleading commercial speech could *also* be deemed to represent a category of unprotected speech subject to government regulation. 466 U.S. at 504 n.22. But in the very same paragraph discussing these unprotected categories of speech, the Court stated that independent review is required in cases involving those categories to determine *whether* the speech in question actually falls within the unprotected category. *Id.* at 505. The footnote thus indicates that cases involving commercial speech that is allegedly false and misleading -- like cases involving speech that allegedly falls into other "unprotected" categories -- require independent review to determine whether the speech at issue in fact falls in that category. See Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1286-1287 (1988).

B. *Bose* Applies to Cases Involving Review of Agency Decisions that Particular Speech Is Unprotected

The Seventh Circuit also declined to apply the *Bose* standard of independent, *de novo* review because of the FTC's alleged "expertise in the field of deceptive advertising." App., *infra*, 8a. That expertise, the court reasoned, justified a greater degree of deference to the FTC's findings than to findings by courts. *Id.* at 8a-9a. It therefore reviewed the FTC's ruling under the "highly deferential, substantial evidence test." *Id.* at 7a.

The Seventh Circuit's decision that it should defer to the agency's findings on a question that determines whether speech is protected by the First Amendment conflicts with this Court's precedents. *Bose* itself stated that independent review of findings that particular speech is unprotected is a "constitutional responsibility" that cannot be shirked on account of the identity of the trier of fact. 466 U.S. at 501. And in *Peel*, the Court engaged in independent, nondeferential review of the findings of a state administrative agency charged with regulating attorney advertising (and of the state supreme court) that an attorney's commercial speech was misleading. 496 U.S. at 97-98, 108 (plurality opinion);

id. at 111-115 (Marshall, J., concurring in the judgment). See also *id.* at 118 (White, J., dissenting).[6]

Similarly, in *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), the Court held that states must provide independent judicial review of determinations by state agencies that certain speech is unprotected by the First Amendment. See Monaghan, 85 COLUM. L. REV. at 269 ("*Freedman v. Maryland* may be taken to establish that administrative action focusing on the content of speech cannot be final, and that the Constitution requires independent judicial judgment on whether the speech is protected."). Certainly there is no reason to think that the findings of *federal* agencies should be treated more deferentially than those of *state* agencies that also can claim to have expertise over matters within their jurisdiction. See *Peel*, 496 U.S. at 108 ("That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity.") (plurality opinion).[7]

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[6] The court of appeals attempted to distinguish *Peel* on the ground that that case involved a "prophylactic regulation applicable to all lawyers," whereas this case involves review of an "individualized FTC cease and desist order, prohibiting a particular set of deceptive ads." App., *infra*, 9a. This supposed distinction, however, is both inaccurate and irrelevant. None of this Court's precedents suggests that *de novo* review is required only for general, "prophylactic" regulations. Indeed, *Bose* itself involved review of a specific finding that the defendant had acted with malice, not some widely applicable rule. See 466 U.S. at 493. Moreover, although *Peel* involved a state regulation applicable to all attorneys, the relevant issue in that case was identical to the issue here: whether the *particular* advertisement in question was misleading and therefore unprotected by the First Amendment and subject to governmental restriction. See 496 U.S. at 100, 107 n.15 (plurality opinion); *id.* at 111-116 (Marshall, J., concurring in the judgment); *id.* at 118 (White, J., dissenting); *id.* at 121-122 (O'Connor, J., dissenting). In short, *Bose* and *Peel* establish that *de novo* review is required whenever a trier of fact determines that particular speech is unprotected, regardless of the scope of the statute, regulation, or common law rule that provides the basis for the restriction on speech.

[7] The cases cited by the Seventh Circuit, App., *infra*, 9a, do not support (continued...)

Furthermore, the Seventh Circuit's decision to defer to the agency's findings in this case conflicts with the decisions of other circuits. In contrast to the Seventh Circuit, the D.C. and Fifth Circuits (in cases preceding *Bose* and *Peel*) have refused to apply the substantial evidence test to agency decisions restricting speech and have reviewed agency findings in such cases *de novo*. See *NBC, Inc.* v. *FCC*, 516 F.2d 1101, 1122 (D.C. Cir. 1974) (holding that courts have a "greater responsibility" in reviewing agency rulings under "fairness doctrine" that "upset [a broadcaster's] journalistic discretion * * * because the area is suffused with First Amendment freedoms"), cert. denied, 424 U.S. 910 (1976); *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1118 (D.C. Cir. 1969) (in case involving Department of Interior regulations restricting demonstrations near White House as means of protecting the President, agency's factual determinations regarding danger to President not entitled to deference because "[t]he expertise of those entrusted with the protection of the President does not qualify them to resolve First Amendment issues, the traditional province of the judiciary"); *Porter* v. *Califano*, 592 F.2d 770, 780 n.15 (5th Cir. 1979) (independent, nondeferential review of agency factfinding "is especially appropriate in the First Amendment area * * * [because] courts, not agencies, are expert on the First Amendment"). See also *Puerto Rico Tele-Com*, 747 F. Supp. at 843 (interpreting *Bose* and *Peel* as requiring independent review of Puerto Rico agency's determination that advertisement was misleading).

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[7] (...continued)
its holding that agency findings restricting speech are entitled to deference. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), predates not only *Bose* and *Peel*, but also the extension of First Amendment protection to commercial speech in general. In addition, the Court in *Colgate-Palmolive* emphasized that "in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." *Id.* at 385. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), though decided after *Bose*, says nothing about the standard of review to be applied in free speech cases in general, let alone to agency decisions implicating the First Amendment.

Finally, the Seventh Circuit's decision is inconsistent with the clear implications of this Court's rulings in cases involving review of other entities' decisions restricting speech. The Court has subjected state court findings limiting speech to nondeferential review even though federalism concerns and the Seventh Amendment (in cases involving jury trials) weigh against searching review by federal appellate courts. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 n.26 (1964); *Bose*, 466 U.S. at 508-509 n.27. Similarly, the Court has applied "rigorous" review to congressional determinations that restrictions on campaign expenditures were necessary to prevent corruption or the appearance of corruption – even though Congress is surely "expert" in the area of campaign finance. See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 29 (1976). See also *Sable Communications* v. *FCC*, 492 U.S. 115, 129 (1989) ("'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'") (quoting *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978)). There is no conceivable reason why an agency's rationale for restricting speech should receive more deference than a similar decision by a state court or a coordinate branch of government.[8]

Indeed, the Seventh Circuit's ruling means that constitutional protection could well turn on the type of enforcement action adopted by the government. For example, a sexually explicit motion picture exhibited both in movie theaters and on television might be found obscene, and hence subject to prohibition, by both

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[8] The Seventh Circuit itself acknowledged that it seems "counter-intuitive to grant more deference to the Commission than to courts." App., *infra*, 8a. It justified such deference, though, on the ground that Commission findings "may require resolution of 'exceedingly complex and technical factual issues.'" *Id.* at 9a (quoting *Zauderer*, 471 U.S. at 645). The FTC's findings that Kraft's ads were implicitly misleading, however, involved no such "complex and technical" issues. Those findings depended solely on the commissioners' subjective impression of the ads' implied meaning. Certainly judges are no less capable than the FTC commissioners of looking at an ad and determining what they think it means. See pages 22-24, *infra*.

a court and the Federal Communications Commission. Under the Seventh Circuit's view, the court's determination would be subject to *de novo* review, while the FCC's would receive deference. The different standards of review, of course, could lead to different outcomes on appeal. This odd result illustrates why agency findings that determine whether speech is unprotected by the First Amendment should not receive more deference than the findings of courts or other factfinders.

In fact, if anything, independent review may even be *more* imperative where the decision of an administrative agency is at issue, for two reasons. First, the legitimacy under Article III and the Due Process Clause of administrative determination of facts affecting constitutional rights (including, but not limited to, the First Amendment) is conditioned on the availability of *de novo* judicial review. See *Crowell* v. *Benson*, 285 U.S. 22, 55-61 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285 (1922); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920). See also Monaghan, 85 COLUM. L. REV. at 247-254; *id.* at 276 ("When the initial decisionmaker is an administrative agency, [independent] review [of facts affecting constitutional rights] may be compelled because administrative action suffers from a so-called legitimacy deficit.").

Second, agencies' very reason for existence -- regulating private conduct -- makes them less sensitive than courts to constitutional protections that restrain their regulatory authority. See *Freedman*, 380 U.S. at 58 ("[t]he teaching of our cases is that * * * only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression").[9] Independent

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[9] See also Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 520-24 (1970); Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1825 (1988) ("Governmental agencies empowered to restrain speech tend inexorably towards restraint. They cannot be relied on to be sensitive to first amendment concerns because their very reason for existence is rooting out violations of the statutory

(continued...)

review is particularly important to check an agency's inherent insensitivity to free speech interests in cases such as this, in which the agency's determination is based not on reliable, objective evidence, but on the subjective, intuitive, and predisposed assessment of agency officials. See pages 22-24, *infra*.

II. THE FTC MAY NOT DETERMINE THAT AN ADVERTISEMENT IS IMPLICITLY MISLEADING TO CONSUMERS BASED SOLELY ON ITS OWN REACTION TO THE AD

The Court also should grant certiorari to determine whether the FTC Act permits the Commission to find that an advertisement is implicitly misleading based solely on its own reading of the ad. Review is essential here because the Commission's interpretation of the Act conflicts with the courts' interpretation of similar provisions in the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) and will have a severe chilling effect on truthful, nonmisleading commercial speech.

A. The Commission's Interpretation of the FTC Act Conflicts With the Courts' Interpretation of the Lanham Act

Both the FTC Act (15 U.S.C. §§ 45(a)(1), 52(a) and (b), 55(a)(1)) and Section 43(a) of the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) prohibit "false" or "misleading" advertising. The principal difference between the two statutes lies in their enforcement schemes. The FTC Act empowers the Federal Trade Commission to issue cease and desist orders against violators and to obtain monetary penalties; the Lanham Act provides a private right of action for persons damaged or likely to be damaged by a false advertisement.

Otherwise, the conduct prohibited by the two statutes is identical. Both statutes have been construed to prohibit not only

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[9] (...continued)
schemes they are mandated to enforce."); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 76-77 (1984) ("Nonjudicial administrative regulations of expressions exist for the sole purpose of regulating; this is their raison d'etre.").

ads that are expressly false, but also ads that, while true on their face, convey misleading implications. And for both statutes, an ad is deemed to convey a misleading implication if a significant number of "reasonable consumers" perceive that implication. See App., *infra*, 38a-40a; *Avis Rent A Car Sys., Inc.* v. *Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986); *American Home Prods. Corp.* v. *Johnson & Johnson*, 577 F.2d 160, 165-166, 172 (2d Cir. 1978).

The approach adopted by the FTC in this case (and approved by the Seventh Circuit), however, creates a substantial difference in the proof required under the two statutes to establish false advertising. The Commission has construed the FTC Act to permit it to find that an advertisement makes an *impliedly* misleading claim merely by reading the ad, without requiring any objective evidence of how actual consumers view the ad. In contrast, to prevail under the Lanham Act, a plaintiff must offer reliable extrinsic evidence, such as consumer surveys, showing that consumers perceive the false claim allegedly implied by the ad. See, *e.g.*, *Abbott Labs.* v. *Mead Johnson & Co.*, 971 F.2d 6, 14 (7th Cir. 1992); *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 228-229 (3d Cir. 1990); *Avis Rent A Car Sys.*, 782 F.2d at 386; *Tambrands, Inc.* v. *Warner-Lambert Co.*, 673 F. Supp. 1190, 1198 (S.D.N.Y. 1987); *Fruit of the Loom, Inc.* v. *Sara Lee Corp.*, 674 F. Supp. 1020, 1021 & n.2 (S.D.N.Y. 1986); *Upjohn Co.* v. *American Home Prods. Corp.*, 598 F. Supp. 550, 556 (S.D.N.Y. 1984); *Borden, Inc.* v. *Kraft, Inc.*, 224 U.S.P.Q. 811 (N.D. Ill. 1984); *U-Haul Int'l, Inc.* v. *Jartran, Inc.*, 522 F. Supp. 1238, 1248-1249 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982). See also 2 J.T. McCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27:7, at 366 (2d ed. 1984); *id.* § 32:54, at 788; Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 526 (1989). As the court stated in one of the leading Lanham Act cases on this subject:

> [W]e are asked to determine whether a statement acknowledged to be literally true and grammatically correct nevertheless has a tendency to mislead, confuse or deceive. As to such a proposition "the public's reaction to [the] advertisement will be the starting point in any discussion of the

> likelihood of deception." * * * A court may, of course, construe and parse the language of the advertisement. It may have personal reactions as to the defensibility or indefensibility of the deliberately manipulated words. * * * [B]ut the court's reaction is at best not determinative and at worst irrelevant.

American Brands, Inc. v. *R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976) (citation omitted).

This stark conflict in the way the two statutes are implemented creates an anomalous situation: if a manufacturer of imitation cheese slices had sued Kraft in federal district court under the Lanham Act and made the *exact same allegations* as the FTC did in this case, the court would have required extrinsic evidence, such as consumer surveys, showing that reasonable consumers would perceive the milk equivalency and imitation superiority claims in Kraft's ads. Indeed, the Seventh Circuit candidly conceded that if "this [were] a Lanham Act case, a reviewing court in all likelihood would have relied on extrinsic evidence of consumer perceptions." App., *infra*, 12a.[10] Yet the court below allowed the FTC to brand Kraft's ads as false and misleading, and to impose a severe penalty, without requiring such proof.

This Court should grant review to resolve this anomaly. There is simply no good reason why the Commission should be allowed to dispense with extrinsic evidence in FTC Act cases when courts regularly require such evidence in making precisely the same inquiry under the Lanham Act.

The sole reason offered by the Seventh Circuit for not following the practice of courts in Lanham Act cases is that the FTC allegedly possesses greater "expertise" than do judges and juries in interpreting advertisements. App., *infra*, 14a. This rationale, however, has been frequently and intensely criticized.

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[10] In fact, in *Borden, Inc.* v. *Kraft, Inc.*, 224 U.S.P.Q. at 819, a court required just such evidence when one of Kraft's competitors, Borden, Inc., claimed that Kraft's ads falsely implied that Borden cheese slices are made with less milk. The court found, moreover, that the extrinsic evidence showed that the ads did *not* convey the alleged claim. *Id.* at 819-821.

See, *e.g.*, Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 OR. L. REV. 561, 572, 602 (1983); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 677-678 (1977); LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971); Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KAN. L. REV. 625 (1969); Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559, 564-565 (1969); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 470-471 (1964). The commissioners simply lack the specialized background or cumulative experience in interpreting advertisements that would justify a presumption of administrative expertise. As Professor Robert Pitofsky wrote after serving as Director of the FTC's Bureau of Consumer Protection (and before his appointment as a commissioner):

> Why questions of meaning should be submitted to the virtually unreviewable discretion of five commissioners of the FTC has never been articulated. Unlike other instances of deference to regulators as part of the administrative process, there is no reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning, nor any indication that successful regulation of advertising requires a balance of related regulatory considerations that commissioners are in a special position to handle.

Pitofsky, 90 HARV. L. REV. at 678. See also Millstein, 64 COLUM. L. REV. at 492-493 (commissioners are not "any more capable of ascertaining the meaning of an advertisement's promise * * * than any other five men * * * or reviewing court").

Moreover, even assuming that the FTC is expert at reading ads per se, no amount of expertise or experience can enable the Commission to predict, merely by looking at an ad, how *reasonable consumers* would interpret the ad -- the very inquiry the FTC is supposed to be making. Consumers' perceptions depend on a host of factors apart from the wording of the ad, including consumers' different cultural, social, and educational backgrounds, their prior experiences with the product advertised, the environment in which they view the ad, and the editorial or program content

surrounding the ad. See Pollay, 17 KAN. L. REV. at 629-631; Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 658, 672-674, 717 (1985); Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 339, 348 (1991). The multiplicity of variables and the unpredictability of their interactive effect on perception make it impossible to determine accurately, merely by examining the ad itself, what implicit messages consumers will derive from the ad. See Comment, 62 OR. L. REV. at 572 ("since the commissioners are highly trained attorneys with very specialized views of advertising, they lack the perspective to accurately identify the meaning given to an advertisement by the general public") (citation omitted). Yet the Commission's approach does not even purport to take account of these external factors in determining how "reasonable consumers" will interpret the ad.

In addition, the FTC's supposed expertise cannot overcome the fundamental problem of the Commission's predisposition to perceive a false message in an advertisement once a complaint has been filed alleging that the ad implies that message. Regardless of how diligently a commissioner may try to step back and view an ad with fresh eyes and ears, there is no way of erasing from his memory the message that the ad is said to convey. The very nature of his task requires that the message be at the forefront of his mind. It is impossible, then, for the FTC to put itself in the shoes of the unbiased consumer who does not know what message he is supposed to look for. See Pollay, 17 KAN. L. REV. at 636 (FTC's "hypothetical suppositions about how consumers might interpret an advertisement * * * ought always to lead to a judgment of the advertisement's capacity to deceive").

For these reasons, the FTC should be required to follow the courts' practice in Lanham Act cases and require objective, extrinsic evidence that a significant number of consumers will perceive an implied claim before it may brand an ad deceptive. See Gellhorn, 17 KAN. L. REV. at 565, 567 (criticizing FTC's "intuitive" or "hunch" method of determining deceptiveness and urging reliance on consumer surveys); Pollay, 17 KAN. L. REV. 625 (same); Comment, 62 OR. L. REV. at 572, 602 (same).

B. The FTC's Practice Chills Truthful, Nonmisleading Advertising

The FTC's practice of relying on its own reading of an ad to find implied claims also will have a significant chilling effect on truthful, nonmisleading advertising. Even if this chilling effect does not rise to the level of a constitutional violation, it provides a compelling reason why the FTC Act should be interpreted as requiring objective, extrinsic evidence of implied claims. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979)).

The Seventh Circuit (particularly Judge Manion) recognized that the FTC's reliance on its own subjective interpretation to determine whether an ad, while literally true, implies a false message threatens to chill nonmisleading, protected speech because advertisers will be unable to predict whether the FTC will find particular ads misleading. See App., *infra*, 16a, 27a-28a. An advertiser (such as Kraft in this case) might run an advertisement after conducting extensive pre-dissemination surveys showing that consumers will not be misled by the ad, only to have the Commission decide that, in its subjective judgment, consumers could be misled. Advertisers accordingly will avoid any speech that the FTC might find misleading.

The ads most vulnerable to this chilling effect are those that provide comparative factual information -- the types of ads that are most helpful to consumers. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976) (noting that the "free flow" of comparative and factual information is "indispensable" to intelligent consumer decision-making and to the proper allocation of resources in a free enterprise system). Fearful that the Commission might find that such ads imply false, though unintended, meanings, advertisers will switch to "soft," feel-good ads that say little or nothing about the product or service being promoted. See Schmidt & Burns, 56 U. CIN. L.

REV. at 1293; Note, 77 VA. L. REV. at 383, 394. Consumers will be the ones ultimately harmed by this result.

Because the Commission's reliance on its own interpretation of an ad to determine whether it makes impliedly misleading claims chills protected speech, the Commission should be required to discard that method in favor of one that allows it to recognize and eliminate misleading speech without simultaneously suppressing truthful information. Cf. *In re R.M.J.*, 455 U.S. 191, 203 (1982) (restriction on deceptive commercial speech may not be "broader than reasonably necessary to prevent the deception"). The FTC Act, like the Lanham Act, therefore should be interpreted as requiring objective extrinsic evidence of an ad's meaning to consumers. Only then would advertisers be able to predict whether particular ads might be found impliedly misleading.

Although it acknowledged the chilling effect that the FTC's practice would have on truthful, nonmisleading advertisements and recognized the "force of Kraft's argument as a policy matter," App., *infra*, 14a-16a, the Seventh Circuit held that this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), "doomed" Kraft's challenge to the FTC's practice. App., *infra*, 15a; *id.* at 27a-28a (Manion, J., concurring). In fact, though, *Zauderer* merely held that the *First Amendment* did not require survey evidence to prove that the particular ad in that case was misleading. 471 U.S. at 650-653. It said nothing about whether the *FTC Act* required such extrinsic evidence. Indeed, *Zauderer* did not even involve the FTC Act, but concerned state disciplinary rules governing attorney advertising. Moreover, the Court in *Zauderer* did not consider the possible chilling effect on nonmisleading speech that could arise from the State's failure to rely on extrinsic evidence. See 471 U.S. at 652-653.

In any event, even if *Zauderer* were relevant to the interpretation of the FTC Act, it does not support the FTC's reliance on its own reading of an ad to find *implied* claims because the ad in that case was misleading *on its face*. In *Zauderer*, a lawyer's advertisement promised that "if there is no recovery, no legal fees are owed by our clients." Losing clients were, however, responsible for costs. Because "legal fees" and "costs" are, in "ordinary usage," "virtually interchangeable" (471 U.S. at 652), the

ad was facially misleading. A consumer who read the ad and applied normal definitions to the terms used would conclude that an unsuccessful client would not have to pay costs. Thus, this Court held that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" *Id.* at 652-653 (quoting *Colgate-Palmolive Co.*, 380 U.S. at 391-392).[11]

But where, as here, the alleged false claims are derived not from common understandings of the actual words in an ad, but from the inferences and deductions that consumers supposedly would make from those words, the claims cannot be said to be "self-evident" from the face of the ad. Contrary to the Seventh Circuit's decision, then, *Zauderer* provides no support for the FTC's reliance on its own reading of an ad where the alleged claims are merely implied.

III. THE QUESTIONS PRESENTED HAVE GREAT LEGAL AND PRACTICAL SIGNIFICANCE

The importance of the issues raised here goes well beyond the confines of this case. The question concerning the appropriate standard of review in commercial speech cases affects not just FTC decisions, but all cases in which the application of a statute, regulation, or common law rule restricts or imposes liability on the basis of commercial speech. Similarly, the question whether the *Bose* independent review standard applies to review of agency

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[11] Similarly, the ad in *Colgate-Palmolive* was also misleading on its face. To prove the moisturizing capability of the company's shaving cream, Colgate-Palmolive's advertisement displayed a "demonstration" of a razor shaving what appeared to be sandpaper but what was actually a "mock-up" of plexiglass coated with sand. The audio portion of the ad *expressly* stated that the substance being shaved was actually sandpaper: "'To prove RAPID SHAVE'S super-moisturizing power, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke.'" 380 U.S. at 376. In any event, *Colgate-Palmolive* preceded the extension of First Amendment protection to commercial speech, and so did not consider the chilling effect that the FTC's decision would have on truthful advertising.

decisions is significant for all cases in which an agency decision has the effect of limiting speech, whether the speech is commercial, political, artistic, educational, or otherwise.

Finally, the chilling effect of the FTC's approach to interpreting advertisements will be felt not only by Kraft, but by all persons and businesses who rely on advertisements to promote their products and services. Indeed, the FTC itself has touted this case as a signal to advertisers of its new aggressiveness in regulating commercial speech. See Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3; Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991), at 2, 4. See also Landler, Schiller & Smart, *Suddenly, Green Marketers Are Seeing Red Flags*, BUS. WK., Feb. 25, 1991, at 74; Quinn, *FTC Is Back in Business of Weeding Out False Ads*, WASH. POST, Feb. 24, 1991, at H3; Foltz, *The Media Business: Advertising; F.T.C. Signals Its Concerns Over Deceptive Campaigns*, N.Y. TIMES, Feb. 14, 1991, at D19. What the FTC has failed to recognize, however, is the deleterious impact its approach will have on truthful, informative ads that are of the greatest value to consumers -- the people whose interests the Commission is supposed to protect. Certiorari should therefore be granted to resolve the important issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1992

APPENDICES

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 91-1691

KRAFT, INC.

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order of the Federal Trade Commission

ARGUED JANUARY 17, 1992--DECIDED JULY 31, 1992

Before FLAUM and MANION, *Circuit Judges*, and CURRAN, *District Judge.*[*]

FLAUM, *Circuit Judge*. Kraft, Inc. ("Kraft") asks us to review an order of the Federal Trade Commission ("FTC" or "Commission") finding that it violated §§ 5 and 12 of the Federal

[*] The Honorable Thomas J. Curran, District Judge of the United States District Court for the Eastern District of Wisconsin, sitting by designation.

Trade Commission Act ("Act"), 15 U.S.C. §§ 45, 52. The FTC determined that Kraft, in an advertising campaign, had misrepresented information regarding the amount of calcium contained in Kraft Singles American Pasteurized Process Cheese Food ("Singles") relative to the calcium content in five ounces of milk and in imitation cheese slices. The FTC ordered Kraft to cease and desist from making these misrepresentations and Kraft filed this petition for review. We enforce the Commission's order.

I.

Three categories of cheese compete in the individually wrapped process slice market: process cheese food slices, imitation slices, and substitute slices. Process cheese food slices, also known as "dairy slices," must contain at least 51% natural cheese by federal regulation. 21 C.F.R. § 133.173(a)(5). Imitation cheese slices, by contrast, contain little or no natural cheese and consist primarily of water, vegetable oil, flavoring agents, and fortifying agents. While imitation slices are as healthy as process cheese food slices in some nutrient categories, they are as a whole considered "nutritionally inferior" and must carry the label "imitation." *Id.* at § 101.3(e)(4). Substitute slices fit somewhere in between; they fall short of the natural cheese content of process cheese food slices yet are nutritionally superior to imitation slices. *Id.* at § 101.3(e)(2). Consistent with FTC usage, we refer to both imitation and substitute slices as "imitation" slices.

Kraft Singles are process cheese food slices. In the early 1980s, Kraft began losing market share to an increasing number of imitation slices that were advertised as both less expense and equally nutritious as dairy slices like Singles. Kraft responded with a series of advertisements, collectively known as the "Five Ounces of Milk" campaign, designed to inform consumers that Kraft Singles cost more than imitation slices because they are made from five ounces of milk rather than less expense ingredients. The ads also focused on the calcium content of Kraft Singles in an effort to capitalize on growing consumer interest in adequate calcium consumption.

The FTC filed a complaint against Kraft charging that this advertising campaign materially misrepresented the calcium content and relative calcium benefit of Kraft Singles. The FTC Act makes it unlawful to engage in unfair or deceptive commercial practices, 15 U.S.C. § 45, or to induce consumers to purchase certain products through advertising that is misleading in a material respect. *Id.* at §§ 52, 55. Thus, an advertisement is deceptive under the Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66 (1984); *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs.*) [hereinafter "FTC Policy Statement"]. In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers.

Two facts are critical to understanding the allegations against Kraft. First, although Kraft does use five ounces of milk in making each Kraft Single, roughly 30% of the calcium contained in the milk is lost during processing. Second, the vast majority of imitation slices sold in the United States contain 15% of the U.S. Recommended Daily Allowance (RDA) of calcium per ounce, roughly the same amount contained in Kraft Singles. Specifically then, the FTC complaint alleged that the challenged advertisements made two implied claims, neither of which was true: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency" claim); and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim).[1]

The two sets of ads at issue in this case, referred to as the "Skimp" ads and the "Class Picture" ads, ran nationally in print and

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[1] Because Kraft concedes that these claims, if made, are false, the second step of the aforementioned inquiry--whether the alleged claims are false--is not before us on appeal.

broadcast media between 1985 and 1987. The Skimp ads were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to their milk and calcium content. The broadcast version of this ad on which the FTC focused contained the following audio copy:

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy Kraft Singles. Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big Kraft means. Good thing I do.
>
> *Singers:* Kraft Singles. More milk makes 'em . . . more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

See CX 62C & Z-72 (television ad); CX 62 Z-33 (print ad); Complaint ¶ 5 and Exs. A-D; IDF 26, 44.[2] The visual image corresponding to this copy shows, among other things, milk pouring into a glass until it reaches a mark on the glass denoted "five ounces." The commercial also shows milk pouring into a glass which bears the phrase "5 oz. milk slice" and which gradually becomes part of the label on a package of Singles. In January 1986, Kraft revised this ad, changing "Kraft *has* five ounces per slice" to "Kraft is *made from* five ounces per slice," IDF 28; *see* CX 276F, CX 106 (emphasis added), and in March 1987, Kraft added the disclosure, "one 3/4 ounce slice has 70% of the calcium of five ounces of milk" as a subscript in the television commercial and as a footnote in the print ads.

The Class Picture ads also emphasized the milk and calcium content of Kraft Singles but, unlike the Skimp ads, did not make an express comparison to imitation slices. The version of this ad

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[2] References to the record are abbreviated as follows:

IDF -initial decision finding
CX -complaint counsel's exhibit
Tr. -transcript of testimony

examined by the FTC depicts a group of school children having their class picture taken, and contains the following audio copy:

> *Announcer (voice over)*: Can you see what's missing in this picture?
>
> Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why Kraft Singles are important. Kraft is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth!
>
> *Photographer*: Say Cheese!
>
> *Kids*: Cheese!
>
> *Announcer (voice over)*: Say Kraft Singles. 'Cause kids love Kraft Singles, right down to their bones.

See CX 2751 & CX 62 Z-11 (television ad); CX 62 Z-55 (print ad); *see also* IDF 38. The Class Picture ads also included the subscript disclaimer mentioned above.

After a lengthy trial, the Administrative Law Judge (ALJ) concluded that both the Skimp and Class Picture ads made the milk equivalency claim. Specifically, the ALJ found that the juxtaposition of references to milk and calcium, along with the failure to mention that calcium is lost in processing, implied that each Kraft Single contains the same amount of calcium as five ounces of milk, and that the altered audio copy and subscript disclosure were confusing and inconspicuous and thus insufficient to dispel this impression. Further, the ALJ concluded that both sets of ads falsely conveyed the imitation superiority claim; he determined that reasonable consumers would take away the net impression that Kraft Singles contain more calcium than imitation slices because Kraft Singles contain five ounces of milk and imitation slices have little or no milk. According to the ALJ, both claims were material because they implicated important health concerns. He therefore ordered Kraft to cease and desist from making these claims about any of its individually wrapped slices of process cheese food, imitation cheese, or substitute cheese.

The FTC affirmed the ALJ's decision, with some modifications. *In re Kraft, Inc.*, FTC No. 9208 (Jan. 30, 1991). As to the Skimp ads, the Commission found that four elements conveyed the milk equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces per slice"; (2) repetition of the precise amount of milk in a Kraft Single (five ounces); (3) the use of the word "so" to link the reference to milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to a five-ounce mark, and the superimposition of that image onto a package of Singles. It also found two additional elements that conveyed the imitation superiority claim: (1) the express reference to imitation slices combined with the use of comparative language ("hardly any," "but"); and (2) the image of a glass containing very little milk during the reference to imitation slices, followed by the image of a glass being filled to the five-ounce mark during the reference to Kraft Singles. The Commission based all of these findings on its own impression of the advertisements and found it unnecessary to resort to extrinsic evidence; it did note, however, that the available extrinsic evidence was consistent with its determinations.

The Commission then examined the Class Picture ads -- once again, without resorting to extrinsic evidence -- and found that they contained copy substantially similar to the copy in the Skimp ads that conveyed the impression of milk equivalency. It rejected, however, the ALJ's finding that the Class Picture ads made an imitation superiority claim, determining that the ads neither expressly compared Singles to imitation slices, nor contained any visual images to prompt such a comparison, and that available extrinsic evidence did not support the ALJ's finding.

The FTC next found that the claims were material to consumers. It concluded that the milk equivalency claim is a health-related claim that reasonable consumers would find important and that Kraft believed that the claim induced consumers to purchase Singles. The FTC presumed that the imitation superiority claim was material because it found that Kraft intended to make that claim. It also found that the materiality of that claim was demonstrated by evidence that the challenged ads led to increased sales despite a substantially higher price for Singles than for imitation slices.

Finally, the FTC modified the ALJ's cease and desist order by extending its coverage from "individually wrapped slices of cheese, imitation cheese, and substitute cheese" to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese." The Commission found that the serious, deliberate nature of the violation, combined with the transferability of the violations to other cheese products, justified a broader order. Kraft filed this petition to set-aside the Commission's order or, alternatively, to modify its scope.

II.

Our standard for reviewing FTC findings has been traditionally limited to the highly deferential, substantial evidence test. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1976); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). However, Kraft argues as a threshold matter that two recent Supreme Court decisions, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11, (1984), and *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), compel us to review the FTC's factual findings *de novo* because they implicate Kraft's first amendment commercial speech rights.

A deferential standard in reviewing FTC findings long predates *Bose* and *Peel*. In *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the Supreme Court held that while the words "deceptive advertising" set forth a legal standard that derives its final meaning from judicial construction, an FTC finding is "to be given great weight by reviewing courts" because it "rests so heavily on inference and pragmatic judgment" and in light of the frequency with which the Commission handles these cases. *Id.* at 385. However, *Colgate-Palmolive* preceded the extension of first amendment protection to commercial speech, *see, e.g.*, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), and subsequent cases examining the contours of that right.

Bose was a libel case holding that appellate courts have a constitutional responsibility to review *de novo* a lower court finding of fact that a defamatory statement was made with actual malice. *Bose*, 466 U.S. at 510-11. The Court declared that judges, as

expositors of the Constitution, must independently decide whether evidence in the record is sufficient to strip allegedly libelous speech of first amendment protection. The Court, however, explicitly left unresolved the question of whether this higher standard of review extended to commercial speech cases. *Id.* at 504 n.22. Kraft asserts that the Court has since answered that question. *Peel* held that a state regulation prohibiting attorneys from advertising a specialty or certification violated the first amendment and, significantly, a plurality of four Justices reviewed this issue *de novo*, *Peel*, 496 U.S. at 108 (citing *Bose*), while Justice Marshall, writing separately, and providing a fifth vote, apparently did so as well. *Id.* at 111-117 (concurring opinion). Thus, *Peel* arguably extended *de novo* review to another sub-category of constitutionally protected speech, commercial advertising.

Nonetheless, we decline to apply *de novo* review in this context. For one, the implications of *Bose* are not as clear as Kraft suggests, see *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985) (refusing to extend *Bose* to the commercial speech context); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 244-47 (1985), and *Bose* itself suggests that commercial speech might not warrant the higher standard of review established for libel cases. *Bose*, 466 U.S. at 504 n.22 (commercial speech generally considered less susceptible to the chilling effect of state regulation than other forms of speech). Although one might argue that *Bose* and *Peel* operating in tandem effectively overrule *Colgate-Palmolive*, we do not think that the Court intended that result. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [Courts] of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). Moreover, there are important distinctions between the sort of appellate review conducted in *Bose* and *Peel* and that done in *Colgate-Palmolive* and this case. The former involved review of court decisions, and courts generally lack the Commission's expertise in the field of deceptive advertising. While it could be posited that it is counter-intuitive to grant more deference to the Commission than to courts,

Commission findings are well-suited to deferential review because they may require resolution of "exceedingly complex and technical factual issues." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 645 (1985); *see also Colgate-Palmolive*, 380 U.S. at 385. In addition, the determination of whether an ad has a tendency to deceive is an impressionistic one more closely akin to a finding of fact than a conclusion of law. *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Most important, the restriction challenged in *Peel* is a completely different animal than the one challenged here. In *Peel*, the issue was whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech, passed constitutional muster.[3] *Peel*, 496 U.S. at 108-09 (plurality); id. at 111 (concurrence). Here, by contrast, the issue is whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster. *See Zauderer*, 471 U.S. at 645-46 (assessing deceptive advertising under the FTC Act a qualitatively different and more complex task than assessing the validity of a state attorney advertising regulation). We find the restriction at issue in *Peel* and the one here sufficiently distinct to justify differing levels of appellate review. Accordingly, we decline to review *de novo* the FTC's findings and, with the substantial evidence test in mind, turn to the facts of this case.

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[3] Kraft disputes this characterization of *Peel*, arguing the Supreme Court was reviewing a specific agency finding of deceptive advertising rather than the state regulation itself. While it is true that the Court examined the state regulation "as applied" to Peel, *Peel*, 469 U.S. at 107 n.15 (plurality); id. at 117 n.1 (concurrence), that does not change the fact that the Court was confronted with a general regulation applicable to all lawyers rather than an administrative order applicable only to a single entity, such as the one Kraft challenges here.

III.

Kraft makes numerous arguments on appeal, but its principal claim is that the FTC erred as a matter of law in not requiring extrinsic evidence of consumer deception. Without such evidence, Kraft claims (1) that the FTC had no objective basis for determining if its ads actually contained the implied claims alleged, and (2) that the FTC's order chills constitutionally protected commercial speech. Alternatively, Kraft contends that substantial evidence does not support the FTC's finding that the Class Picture ads contain the milk equivalency claim. Finally, Kraft maintains that even if it did make the alleged milk equivalency and imitation superiority claims, substantial evidence does not support the FTC's finding that these claims were material to consumers. We address each contention in turn.

A.

1.

In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence. *Thompson Medical*, 104 F.T.C. at 788-89; *Cliffdale Assocs.*, 103 F.T.C. 110, 164-66 (1984); *FTC Policy Statement*, 103 F.T.C. at 176. The most convincing extrinsic evidence is a survey "of what consumers thought upon reading the advertisement in question," *Thompson Medical*, 104 F.T.C. at 788-89, but the Commission also relies on other forms of extrinsic evidence including consumer testimony, expert opinion, and copy tests of ads. *FTC Policy Statement*, 103 F.T.C. at 176 n.8.

Kraft has no quarrel with this approach when it comes to determining whether an ad conveys *express* claims, but contends that the FTC should be required, as a matter of law, to rely on extrinsic evidence rather than its own subjective analysis in all cases

involving allegedly *implied* claims.[4] The basis for this argument is that implied claims, by definition, are not self-evident from the face of an ad. This, combined with the fact that consumer perceptions are shaped by a host of external variables -- including their social and educational backgrounds, the environment in which they view the ad, and prior experiences with the product advertised, *see* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. Rev. 658, 672-74, 717 (1985); Richard Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 U. Kan. L. Rev. 625, 629-31 (1969) -- makes review of implied claims by a five-member commission inherently unreliable. The Commissioners, Kraft argues, are simply incapable of determining what implicit messages consumers are likely to perceive in an ad. Making matters worse, Kraft asserts that the Commissioners are predisposed to find implied claims because the claims have been identified in the complaint, rendering it virtually impossible for them to reflect the perceptions of unbiased consumers. *See* Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 Or. L. Rev. 561, 572 (1983) ("since the commissioners are highly trained attorneys with very specialized views of advertising, they lack the perspective to accurately identify the meaning given an advertisement by the general public").

Kraft buttresses its argument by pointing to the use of extrinsic evidence in an analogous context: cases brought under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). Courts hearing deceptive advertising claims under that Act, which provides a private right of

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[4] Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way. *Thompson Medical*, 104 F.T.C. at 788. To illustrate, consider the following. Suppose a certain automobile gets poor gas mileage, say, 10 miles per gallon. One advertisement boasts that it gets 30 miles per gallon while another identifies the car as the "Miser," depicts it rolling through the countryside past one gas station after another, and proclaims that the car is inexpensive to operate. Both ads make deceptive claims: the first does so expressly, the second does so impliedly.

action for deceptive advertising, generally require extrinsic proof that an advertisement conveys an implied claim. *See, e.g., Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986); *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190, 1198 (S.D.N.Y. 1987); *see generally* Ivan L. Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 Trademark Rep. 508, 526 (1989). Were this a Lanham Act case, a reviewing court in all likelihood would have relied on extrinsic evidence of consumer perceptions. While this disparity is sometimes justified on grounds of advertising "expertise" -- the FTC presumably possesses more of it than courts, *see American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 172 n.27. (2d Cir. 1978) -- Kraft maintains this justification is an illusory one in that the FTC has no special expertise in discerning consumer perceptions. *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 678 (1977); Ernest Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. Kan. L. Rev. 559, 564-65 (1969). Indeed, proof of the FTC's inexpertise abounds: false advertising cases makes up a small part of the Commission's workload, *see* Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. B.J. 548, 571 (1964), most commissioners have little prior experience in advertising, *see* Paul H. LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971), and the average tenure of commissioners is very brief. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 86 (1969) (average tenure of four years). That evidence aside, no amount of expertise in Kraft's view can replace the myriad of external variables affecting consumer perceptions. Here, the Commission found implied claims based solely on its own intuitive reading of the ads (although it did reinforce that conclusion by examining the proffered extrinsic evidence). Had the Commission fully and properly relied on available extrinsic evidence, Kraft argues it would have conclusively found that consumers do not perceive the milk equivalency and imitation superiority claims in the ads.

While Kraft's arguments may have some force as a matter of policy, they are unavailing as a matter of law. Courts, including

the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, *see Colgate-Palmolive*, 380 U.S. at 391-92 (FTC not required to conduct consumer surveys before determining that a commercial has a tendency to mislead); *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part*, 348 U.S. 940 (1955); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944); *accord Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Prods. Co. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982); *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 n. 11 (9th Cir. 1978); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985); *Thompson Medical*, 791 F.2d at 197, and we decline to do so as well. We hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.

Kraft's case for a per se rule has two flaws. First, it rests on the faulty premise that implied claims are inescapably subjective and unpredictable. In fact, implied claims fall on a continuum, ranging from the obvious to the barely discernible. *Thompson Medical*, 104 F.T.C. at 788-89. The Commission does not have license to go on a fishing expedition to pin liability on advertisers for barely imaginable claims falling at the end of this spectrum. However, when confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings. *See Colgate-Palmolive*, 380 U.S. at 391-92 (FTC need not conduct a consumer survey in finding commercial misleading); *cf. Zauderer*, 471 U.S. at 652-53 (implied claims that are self-evident do not require the State to conduct a public survey before finding advertisement misleading). The implied claims Kraft made are reasonably clear from the face of the advertisements, and hence the Commission was not required to utilize consumer surveys in reaching its decision.

Second, Kraft's reliance on Lanham Act decisions is misplaced. For one, not all courts applying the Lanham Act rely on extrinsic evidence when confronted with implied claims, *see,*

e.g., *Better Business Bureau, Inc. v. Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982); *American Home Prods. v. Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987), but more importantly, when they do, it is because they are ill equipped -- unlike the Commission -- to detect deceptive advertising. *See, e.g.*, *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228 (3d Cir. 1990); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984). And the Commission's expertise in deceptive advertising cases, Kraft's protestations notwithstanding, undoubtedly exceeds that of courts as a general matter. That false advertising cases constitute a small percentage of the FTC's overall workload does not negate the fact that significant resources are devoted to such cases in absolute terms, nor does it account for the institutional expertise the FTC gains through investigations, rulemakings, and consent orders. The Commissioners' personal experiences quite obviously affect their perceptions, but it does not follow that they are incapable of predicting whether a particular claim is likely to be perceived by a reasonable number of consumers.

2.

The crux of Kraft's first amendment argument is that the FTC's current subjective approach chills some truthful commercial speech. Kraft acknowledges the novelty of its argument, but asserts that the issue warrants consideration in light of evolving commercial speech doctrine. Once regarded as unprotected by the first amendment, *see Valentine v. Chrestensen*, 316 U.S. 52 (1942), commercial speech, as noted, has since been brought within the sphere of constitutional protection. *Virginia Pharmacy Bd.*, 425 U.S. at 770. Society has a strong interest "in the free flow of commercial information" critical to a free market economy, *id.* at 763, and it is this interest the first amendment vindicates in protecting commercial speech. *Brown & Williamson*, 778 F.2d at 43. However, "[f]alse, deceptive, or misleading advertising" does not serve that interest and thus this category of commercial speech "remains subject to restraint." *In re R.M.J.*, 455 U.S. 191, 200 (1982).

Kraft contends that by relying on its own subjective judgment that an ad, while literally true, implies a false message, the FTC chills nonmisleading, protected speech because advertisers are unable to predict whether the FTC will find a particular ad misleading. Advertisers can run sophisticated pre-dissemination consumer surveys and find no implied claims present, only to have the Commission determine in its own subjective view that consumers would perceive an implied claim. Indeed, Kraft maintains that is precisely what happened here. Even more troubling, Kraft maintains that the ads most vulnerable to this chilling effect are factual, comparative ads, like the Five Ounces of Milk campaign, of greatest benefit to consumers. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65 (noting that the "free flow" of comparative advertising is "indispensable" to intelligent consumer decisionmaking). The net result of the Commission's subjective approach will be an influx of soft "feel good" ads designed to avoid unpredictable FTC decisions. *See* Richard M. Schmidt, Jr. & Robert C. Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. Cin. L. Rev. 1273, 1293 (1988); Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 49(a) of the Lanham Act*, 77 Va. L. Rev. 339, 349 (1991). The way to avoid this chilling effect, according to Kraft, is to require the Commission to rely on objective indicia of consumer perceptions in finding implied claims.

Kraft's first amendment challenge is doomed by the Supreme Court's holding in *Zauderer*, which established that no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence. *See Zauderer*, 471 U.S. at 652-534; *accord American Home*, 695 F.2d at 688 n.10. In *Zauderer*, a lawyer advertised that clients who retained him on a contingent-fee basis would not have to pay *legal fees* if their lawsuits were unsuccessful, without disclosing that these clients would be charged for *costs*, even though these are terms of art unknown to most laypersons; thus, the ad implied that hiring this lawyer was a no-lose proposition to potential clients. The state sanctioned Zauderer for engaging in misleading advertising, and he challenged that sanction on first amendment grounds. In approving the state's action, the Supreme Court

declared, "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" *Zauderer*, 471 U.S. at 652-53 (quoting *Colgate-Palmolive*, 380 U.S. at 391-92).

Thus, *Zauderer* teaches that consumer surveys are not compelled by the first amendment when the alleged deception although implied, is conspicuous. In both *Zauderer* and here, an omitted piece of information -- the definition of a key contractual term in *Zauderer*, the effect of processing on nutrient content here -- led to potential consumer deception, and in both cases the ads were literally true, yet impliedly misleading. Kraft's implied claims were reasonably clear from the face of the ads and not unpredictable to Kraft. Our conclusion is strengthened by the fact that commercial speech is generally considered less susceptible to the chilling effect of regulation than other, more traditionally recognized forms of speech, such as political discourse. *See Bose*, 466 U.S. at 504 n.22 ("danger [minimal] that governmental regulation of false or misleading . . . product advertising will chill accurate and nondeceptive commercial expression"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). Because we conclude that the Commission was not required to rely on extrinsic evidence, we need not examine the extrinsic evidence proffered by Kraft that it says contravenes the Commission's findings. We note, however, that the Commission did thoroughly examine this evidence, albeit after the fact, and found that it did not refute the implied claim findings and that some of the evidence was based on unsound consumer testing methodologies.

Our holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception. Along those lines, the Commission would be well-advised to adopt a consistent position on consumer survey methodology -- advertisers and the FTC, it appears, go round and round on this issue -- so that any uncertainty is reduced to an absolute minimum.

B.

Alternatively, Kraft argues that substantial evidence does not support the FTC's finding that the Class Picture ads convey a milk equivalency claim. (Recall that the FTC, unlike the ALJ, concluded that the Class Picture ads did not contain the imitation superiority claim, leaving only the milk equivalency finding on appeal.) Kraft claims that the Commission merely extrapolated its analysis from the Skimp ads to the Class Picture ads without considering significant differences between the two. The Commission stated, for example, that the Class Picture ads "contain copy elements substantially similar to the 'Skimp' ad elements that convey the impression of milk equivalency." *In re Kraft, Inc.*, FTC No. 9208, slip op. at 22. Kraft points out that the Class Picture ads contain only one of the four elements of the Skimp ads -- the reference to five ounces of milk juxtaposed with a reference to calcium content -- that contributed to the FTC's milk equivalence finding. And Kraft adds that the reference to five ounces of milk per slice and to calcium merely states that each slice has a large amount of calcium because of its milk content, a completely true inference. The ads do not state or imply that each slice actually *contains* five ounces of milk or its calcium equivalent. Indeed, Kraft asserts that no reasonable consumer could think that a 3/4 ounce of slice of cheese contains five ounces of milk.

We find substantial evidence in the record to support the FTC's finding. Although Kraft downplays the nexus in the ads between milk and calcium, the ads emphasize visually and verbally that five ounces of milk go into a slice of Kraft Singles; this image is linked to calcium content, strongly implying that the consumer gets the calcium found in five ounces of milk. The fact that the Commission listed four elements in finding an implied claim in the Skimp ads does not mean that those same elements must all be present in the Class Picture ad to reach that same conclusion. Furthermore, the Class Picture ads contained one other element reinforcing the milk equivalency claim, the phrase "5 oz. milk slice" inside the image of a glass superimposed on the Singles package, and it was reasonable for the Commission to conclude that there were important similarities between these two ads. Finally, to support its own interpretation of the ads, the Commission

examined available extrinsic evidence and this evidence, in the Commission's view, bolstered its findings.

Kraft asserts that the literal truth of the Class Picture ads -- they *are* made from five ounces of milk and they *do* have a high concentration of calcium -- makes it illogical to render a finding of consumer deception. The difficulty with this argument is that even literally true statements can have misleading implications. *See Zauderer*, 471 U.S. at 652; *see also Thompson Medical*, 791 F.2d at 197; *Removatron Int'l Corp.*, 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *American Home Prods.*, 695 F.2d at 687. Here, the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing, which leaves consumers with a misleading impression about calcium content. The critical fact is not that reasonable consumers might believe that a 3/4 ounce slice of cheese actually contains five ounces of milk, but that reasonable consumers might believe that a 3/4 ounce slice actually contains the calcium in five ounces of milk.

C.

Kraft next asserts that the milk equivalency and imitation superiority claims, even if made, are not material to consumers. A claim is considered material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." *Cliffdale Assocs.*, 103 F.T.C. at 165; FTC Policy Statement, 103 F.T.C. at 175, 182. The Commission is entitled to apply, within reason, a presumption of materiality, *Colgate-Palmolive*, 380 U.S. at 392, and it does so with three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Thompson Medical*, 104 F.T.C. at 816-17; *FTC Policy Statement*, 103 F.T.C. at 182-83. Absent one of these situations, the Commission examines the record and makes a finding of materiality or immateriality. *Id.*

Here, the ALJ concluded that both claims were presumptively material because calcium is a significant health concern to consumers. The Commission upheld this conclusion, although it

applied a presumption of materiality only to the imitation superiority claim. Kraft asserts the Commission's determination is not supported by substantial evidence. We disagree.

In determining that the milk equivalency claim was material to consumers, the FTC cited Kraft surveys showing that 71% of respondents rated calcium content an extremely or very important factor in their decision to buy Kraft Singles, and that 52% of female, and 40% of all respondents, reported significant personal concerns about adequate calcium consumption. The FTC further noted that the ads were targeted to female homemakers with children and that the 60 milligram difference between the calcium contained in five ounces of milk and that contained in a Kraft Single would make up for most of the RDA calcium deficiency shown in girls aged 9-11. Finally, the FTC found evidence in the record that Kraft designed the ads with the intent to capitalize on consumer calcium deficiency concerns.

Significantly, the FTC found further evidence of materiality in Kraft's conduct: despite repeated warnings, Kraft persisted in running the challenged ads. Before the ads even ran, ABC television raised a red flag when it asked Kraft to substantiate the milk and calcium claims in the ads. Kraft's ad agency also warned Kraft in a legal memorandum to substantiate the claims before running the ads. Moreover, in October 1985, a consumer group warned Kraft that it believed the Skimp ads were potentially deceptive. Nonetheless, a high-level Kraft executive recommended that the ad copy remain unaltered because the "Singles business is growing for the first time in four years due in large part to the copy." CX 63B; IDF 191. Finally, the FTC and the California Attorney General's Office independently notified the company in early 1986 that investigations had been initiated to determine whether the ads conveyed the milk equivalency claims. Notwithstanding these warnings, Kraft continued to run the ads and even rejected proposed alternatives that would have allayed concerns over their deceptive nature. From this, the FTC inferred -- we believe, reasonably -- that Kraft thought the challenged milk equivalency claim induced consumers to purchase Singles and hence that the claim was material to consumers. *See Cliffdale Associates*, 103 F.T.C. at 165; *FTC Policy Statement*, 103 F.T.C. at 175, 182.

With regard to the imitation superiority claim, the Commission applied a presumption of materiality after finding evidence that Kraft intended the challenged ads to convey this message. (Recall that intent to convey a claim is one of three categories qualifying for a presumption of materiality. *See, e.g., Thompson Medical*, 104 F.T.C. at 816-17.) It found this presumption buttressed by the fact that the challenged ad copy led to increased sales of Singles, even though they cost 40 percent more than imitation slices. Finally, the FTC determined that Kraft's consumer surveys were insufficient to rebut this inference and in particular criticized Kraft's consumer survey methodology because it offered limited response options to consumers.

Kraft asserts that neither materiality finding is supported by substantial evidence. It contends that the survey evidence on which the Commission relied shows only that calcium, not milk equivalency, is important to consumers. Materiality, Kraft maintains, turns on whether the claim *itself*, rather than the *subject matter* of the claim, affects consumer decision-making; accordingly, the Commission had to show that consumers would have acted differently with knowledge that Singles contain 70% rather than 100% of the calcium in five ounces of milk. See *FTC Policy Statement*, 103 F.T.C. at 175 (claim is material if it is "likely to affect the consumer's conduct or decision with regard to a product"). With the inquiry defined in this manner, the only relevant evidence on point -- a consumer survey showing that 1.7% of respondents would stop buying Singles if informed of the effect of processing on calcium content -- definitively disproves materiality. With regard to its conduct, Kraft argues it persisted in running the ads because it thought the ads *as a whole*, not the milk equivalency claim *per se*, contributed to increased sales and that, in any event, it responded to warnings by making a good faith attempt to modify the ads. Kraft repeats these arguments in attacking the FTC's finding that imitation superiority claim was material to consumers, claiming the evidence adduced showed only that Kraft intended to use the ads to differentiate Singles from imitation slices based on *milk* content, and not on *calcium* content, and that sales increased as a result of this general theme; inferring that the imitation superiority claim contributed to increased sales is pure conjecture.

Kraft's arguments lack merit. The FTC found solid evidence that consumers placed great importance on calcium consumption and from this reasonably inferred that a claim quantifying the calcium in Kraft Singles would be material to consumers. It rationally concluded that a 30% exaggeration of calcium content was a nutritionally significant claim that would affect consumer purchasing decisions. This finding was supported by expert witnesses who agreed that consumers would prefer a slice of cheese with 100% of the calcium in five ounces of milk over one with only 70%. *See* Tr. 1176-78 (Stewart); Tr. 3663-64 (Jacoby). Likewise, the materiality presumption applied to the imitation superiority claim was supported by substantial evidence. This finding rested on internal company documents showing that Kraft designed the ads to deliver an imitation superiority message. *See* CX 32B, 120, 122A, 4S. Although Kraft produced a study refuting this finding, the Commission discounted that study after finding its methodology flawed. Kraft concedes that the Skimp ads increased sales of Singles, but contends that the Commission cannot carry its burden of demonstrating a linkage between the ads and the imitation superiority claim *per se*. However, this increase in sales corresponded directly with the ad campaign and indisputably reversed that sagging sales and market share of Kraft Singles that had been attributed to competition from imitation slices. Moreover, Kraft's increase in market share came at a time when Singles were priced roughly 40% higher than imitation slices. Thus, the Commission reasonably inferred that the imitation superiority message, as a central theme in the ads, contributed to increased sales and market share.

IV.

The Commission's cease and desist order prohibits Kraft from running the Skimp and Class Picture ads, as well as from advertising any calcium or nutritional claims not supported by reliable scientific evidence. This order extends not only to the product contained in the deceptive advertisements (Kraft Singles), but to all Kraft cheeses and cheese-related products, which include Cracker Barrel, Velveeta, and Philadelphia Brand Cream Cheese. Kraft contends this order is too broad and must be set-aside or modified because it (1) bans constitutionally protected commercial

speech, and (2) is not rationally related to Kraft's violation of the Act.

A.

First amendment infirmities arise, according to Kraft, from the sweep of the order: by banning commercial speech that is only *potentially* misleading, the order chills some non-deceptive advertising deserving of constitutional protection. Kraft acknowledges that sweeping bans of this variety comport with traditional FTC practice, *see, e.g.*, *Cliffdale Assocs.*, 103 F.T.C. at 165, and have been repeatedly upheld against first amendment challenges in the past. *See Bristol-Myers Co.*, 738 F.2d at 562; *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *National Comm'n on Egg Nutrition*, 570 F.2d at 163; *American Home Prods.*, 695 F.2d at 688 n.10; *Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 399-400 (9th Cir. 1982); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 373-74 (9th Cir. 1982); *Brown & Williamson Tobacco Corp.*, 778 F.2d at 40-41. It nonetheless again relies on the Supreme Court's recent decision in *Peel*, 496 U.S. 91 (plurality); *id.* at 111 (concurrence), in attacking the FTC's order.

Peel was sanctioned by the State of Illinois for advertising on his letterhead that he was a certified trial specialist, which violated a state regulation prohibiting lawyers from advertising any certifications or specialties. The Court first concluded that Peel's advertisement was only *potentially* misleading (some consumers might incorrectly assume that this was a state-sanctioned certification), not *inherently* misleading, *compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (door-to-door solicitation of legal services inherently misleading), and that only the latter can be categorically banned by the state. *Peel*, 469 U.S. at 108-110 & n.17 (plurality); *id.* at 111 (concurrence). Restrictions on potentially misleading speech, by contrast, can be no "broader than reasonably necessary to prevent the [deception]" and may not categorically prohibit such speech if less restrictive alternatives are available. *Id.* at 107-108 (citing *In re R.M.J.*, 455 U.S. at 203). Because such alternatives were available to Illinois (*e.g.*, a disclosure requirement), the Court held that this categorical ban violated the first amendment, *Peel*, 469 U.S. at 108-110 & n.17

(plurality); *id.* at 111-12 (concurrence), and added that the burden was on the state, not the advertiser, to come up with a less restrictive regulation. *Id.* at 109-11 (plurality) (state must draft a narrower regulation to correct potential consumer and Peel may continue using letterhead in the interim); *id.* at 117 (concurrence).

Kraft asserts that its advertisements are only potentially misleading, like the letterhead statement in *Peel*, because the milk equivalency and imitation superiority claims are true and verifiable, there is no evidence that these claims actually misled consumers, and the advertising medium is not inherently conducive to deception. Alternative remedial measures were readily available to the Commission, such as modifications to the ads or prominent disclosures, and thus, Kraft contends, the order is broader than reasonably necessary to prevent deception. Moreover, Kraft asserts the order put the onus on it to come up with nonmisleading alternatives in contravention of *Peel*.

We reject Kraft's argument. To begin with, the Commission determined that the ads were *actually* misleading, not *potentially* misleading, thus justifying a total ban on the challenged ads. *See Peel*, 469 U.S. at 100 ("[m]isleading advertising may be prohibited entirely"). Moreover, even if we were to assume the order bans some potentially misleading speech, it is only constitutionally defective if it is no "broader than reasonably necessary to prevent the [deception]." Id. at 107. We conclude that it is sufficiently narrow to pass constitutional muster. Unlike the prophylactic regulation in *Peel*, which banned an entire category of commercial speech, the restriction at issue here is an administrative cease and desist order directed toward one company's cheese ads and predicated on a specific finding of past deceptive practices.

To reiterate, the FTC's order does two things: it prohibits the Skimp ads and the Class Picture ads (as *currently* designed) and it requires Kraft to base future nutrient and calcium claims on reliable scientific evidence. Kraft mischaracterizes the decision as a categorical ban on commercial speech when in fact it identifies with particularity two nutrient claims that the Commission found actually misleading and prohibits only those claims. It further places on Kraft the (minor) burden of supporting future nutrient claims with

reliable data. This leaves Kraft free to use any advertisement it chooses, including the Skimp and Class Picture ads, so long as it either eliminates the elements specifically identified by the FTC as contributing to consumer deception or corrects this inaccurate impression by adding prominent, unambiguous disclosures. *See, e.g., Removatron*, 884 F.2d at 1497. We note one additional consideration further alleviating first amendment concerns; Kraft, like any party to an FTC order, may seek an advisory opinion from the Commission as to whether any future advertisements comply with its order, 16 C.F.R. § 2.41(d), and this procedure has been specifically cited by courts as one method of reducing advertiser uncertainty. *See Colgate-Palmolive*, 380 U.S. at 394; *Jay Norris*, 598 F.2d at 1251; *National Comm'n on Egg Nutrition*, 570 F.2d at 163; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1404 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

For these reasons, we hold that the specific prohibitions imposed on Kraft in the FTC's cease and desist order are not broader than reasonably necessary to prevent deception and hence not violative of the first amendment. We wish to reemphasize the limits of this order to assuage any fears Kraft might have about compliance. The *subject* of Kraft's ads (*i.e.*, the milk and calcium content of Singles) is obviously a perfectly legitimate subject of commercial advertising. It is only the *manner* of presentation that needs rectification. Kraft is free to continue advertising the milk and calcium content in its cheese products, and it can avoid future violations by correcting the misleading elements identified in the FTC's decision. Kraft could, for example, redesign the Skimp and Class Picture ads so that calcium content is accurately presented (*i.e.*, "each Kraft Single contains the calcium equivalent of 3.5 ounces of milk") or it could add prominent, unambiguous disclosures about calcium loss in processing, either of which would put it in full compliance with the order.

B.

Alternatively, Kraft argues that the scope of the order is not "reasonably related" to Kraft's violation of the Act because it extends to products that were not the subject of the challenged advertisements. The FTC has discretion to issue multi-product orders, so-called "fencing-in" orders, that extend beyond violations

of the Act to prevent violators from engaging in similar deceptive practices in the future. *Colgate-Palmolive*, 380 U.S. at 395; *Sears*, 676 F.2d at 391-92. Such an order must be sufficiently clear that it is comprehensible to the violator, and must be "reasonably relat[ed]" to a violation of the Act. *Colgate Palmolive*, 380 U.S. at 394-95. Kraft does not challenge the order's clarity or precision but only its reasonableness.

In determining whether a broad fencing-in order bears a "reasonable relationship" to a violation of the Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations. *Thompson Medical*, 104 F.T.C. at 883; *see also Sears*, 676 F.2d at 391-92. Here, the ALJ found that Kraft had not engaged in a long-term pattern of deceptive advertising, and that this was an isolated incident in response to significant competitive pressures on Kraft; hence, the ALJ opted for a narrow order. The FTC disagreed; it concluded that Kraft's violations were serious, deliberate, and easily transferable to other Kraft products, thus warranting a broad fencing-in order.

We find substantial evidence to support the scope of the order. The Commission based its finding of seriousness on the size ($15 million annually) and duration (two and one-half years) of the ad campaign and on the difficulty most consumers would face in judging the truth or falsity of the implied calcium claims. Although Kraft disputes the Commission's $15 million figure, arguing it covers many non-deceptive or unchallenged advertisements, that does not obviate the fact that this was an expensive, nationwide campaign with highly effective results. Moreover, the FTC properly found that it is unreasonable to expect most consumers to perform the calculations necessary to compare the calcium content of Kraft Singles with five ounces of milk given the fact that the nutrient information on milk cartons is not based on a five ounce serving.

As noted previously, the Commission also found that Kraft's conduct was deliberate because it persisted in running the challenged ad copy despite repeated warnings from outside sources that the copy might be implicitly misleading. *See Thompson*

Medical, 104 F.T.C. at 834-35. Kraft challenges this finding, arguing it responded to these warnings by acting in good faith to modify the ads, and further that it commissioned a post-dissemination survey to determine whether the complaints had any merit. This survey found that only an insignificant percentage of respondents detected the alleged claims. We reject these contentions. The deceptive claims were apparent from the face of the ad, but even if they somehow eluded Kraft, the Commission reasonably concluded that the steady stream of warnings should have put Kraft on notice that its surveys were somehow inadequate or defective. Kraft made three modifications to the ads, but two of them were implemented at the very end of the campaign, more than two years after it had begun. This dilatory response provided a sufficient basis for the Commission's conclusion.

The Commission further found that the violations were readily transferable to other Kraft cheese products given the general similarity between Singles and other Kraft cheeses. Kraft contends that the FTC cited no evidence to support this finding of transferability and therefore placed the burden on Kraft to show lack of transferability to other products in violation of the Administrative Procedure Act, 5 U.S.C. § 556(d), and the FTC's own regulations. 16 C.F.R. § 3.43(a); *see also Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33, 36 (2d Cir. 1975). We conclude that the FTC's finding of transferability was also reasonable. Kraft's other cheeses contain calcium and Kraft failed to provide any evidence to justify excepting these products from the order. This did not shift the burden to Kraft but merely recognized that counsel for the FTC presented a *prima facie* case for a fencing-in order and that Kraft failed to rebut this particular point.

Finally, the FTC concluded that these factors outweighed Kraft's lack of prior violations. Kraft maintains that the Commission simply brushed aside its clean record even though prior violations are highly probative of propensity to commit future violations. This contention is also without merit because it is the circumstances of the violation as a whole, and not merely the presence or absence of any one of factor, that justifies a broad order. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 304-05 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Sears, Roebuck & Co.*, 676 F.2d at 392. Hence, the FTC reasonably concluded

that the seriousness, deliberateness, and transferability of the violations took precedence over the absence of any prior Kraft violations.

V.

For the foregoing reasons, Kraft's petition to set-aside the order is DENIED and the Commission's order is ENFORCED.

MANION, *concurring*. While I concur with the opinion of the court, I am concerned that the FTC can avoid extrinsic evidence by simply concluding that a deceptive, implied claim is facially apparent. While the FTC has expertise, consumer surveys provide at least some objective determination of what the purchaser thinks and should be considered since, after all, the consumer is among those we are trying to protect.

Moreover, the FTC's current procedure threatens to chill nonmisleading, protected speech. Although not all commercial speech has constitutional protection, the law has developed since this court decided that the FTC could rely on its own interpretation of ads in *National Bakers Serv., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964), *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part* 348 U.S. 940 (1955), and *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944). The Supreme Court has recognized that a free flow of information is indispensable to decisionmaking in the free enterprise system. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). But the FTC jeopardizes this flow by relying on the FTC commissioners' subjective interpretation to determine whether an ad, while literally true, implies a false message. Advertisers will be unable to predict whether the FTC will find particular ads misleading. Pre-dissemination surveys showing consumers *are not* misled will be useless since the FTC is free to ignore any such extrinsic evidence and rely on its subjective judgment that consumers *may* be misled. Advertisers unwilling to gamble with a multi-million dollar ad campaign have essentially two choices: (1) submit every campaign to the FTC in advance or (2) disseminate ads that say little or nothing about a product or service. An advertiser will not want to

risk producing comparative ads which the FTC may ultimately find to imply false, unintended messages.

In this case, the panel's opinion correctly concludes that *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) controls the extrinsic evidence issue. The Supreme Court did determine that consumer surveys are not compelled by the first amendment when the "possibility of deception is as self-evident as it is in [*Zauderer*]." *Id.* at 2282. In both this case and *Zauderer*, an omitted piece of information led to an implication which turned an ad that was literally true into a potentially deceiving ad. But it is important to note that neither this case nor *Zauderer* gives the FTC leave to ignore extrinsic evidence in every case.

Unfortunately, judicial groping for a distinction between cases where extrinsic evidence is necessary and those where it is not is leaving both advertisers and the FTC uncertain. All *Zauderer* tells them is that extrinsic evidence is not needed when the "possibility of deception is as self-evident as it is in [*Zauderer*]." *Id.* All this court tells them is that the FTC need not rely on such evidence if the "implied claims [are] reasonably clear from the face of the ads and not unpredictable." Op. at 17. Rather than leaving judges to hew the contours of this issue, the FTC would be well-advised to take this court's suggestion -- apply its expertise and develop a consumer survey methodology that advertisers can use to ascertain whether their ads contain implied, deceptive messages.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Janet D. Steiger, Chairman
Mary L. Azcuenaga
Andrew J. Strenio, Jr.
Deborah K. Owen
Roscoe B. Starek, III

In the Matter of	
KRAFT, INC., a corporation.	Docket No. 9208

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondent Kraft, Inc., and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision of the Administrative Law Judge, except as otherwise noted, and enter the following Order. Accordingly,

I.

IT IS ORDERED that respondent Kraft, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any product that is a cheese, related cheese product, imitation cheese, or substitute cheese, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product;

B. Misrepresenting in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product;

C. Representing in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean, for purposes of this Order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results; or

D. Representing in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean, for purposes of this Order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

II.

IT IS FURTHER ORDERED that for three (3) years after the last date of dissemination of any representation concerning any product specified in Part I of this Order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondent in disseminating such representation; and

2. All test reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation.

III.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising under this Order.

IV.

IT IS FURTHER ORDERED that respondent shall, within thirty (30) days after this Order becomes final, distribute a copy of this Order to each of its operating divisions, and to all distributors of any product manufactured or marketed by respondent that is specified in Part I of this Order.

V.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after this Order becomes final, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission, Commissioner Starek not participating.

Donald S. Clark/s
Donald S. Clark
Secretary

SEAL

ISSUED: January 30, 1991

ATTACHMENT:

Opinion of the Commission

BO92154

D. 9208

OPINION OF THE COMMISSION

By Owen, Commissioner:

I. INTRODUCTION

Respondent Kraft, Inc. ("Kraft") is one of the largest food products companies in the United States. Kraft produces and markets a broad line of cheese and dairy products under various brand names. One such product is Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles"), which consists of individual cellophane-wrapped slices of pasteurized process cheese food sold in various count packages. Kraft is charged with violating Sections 5 and 12 of the Federal Trade Commission Act by materially misrepresenting the calcium content and relative calcium benefit of Kraft Singles in a series of nationally disseminated broadcast and print advertisements that ran from early 1985 through mid-1987.[1]

The challenged advertisements are known as the "Skimp" and the "Class Picture/5 ounce" (or "Class Picture/II") ads, which were developed as part of Kraft's overall "Five Ounces of Milk" advertising campaign. The "Five Ounces of Milk" strategy was developed in 1983 by Kraft and its advertising agency, J. Walter Thompson, to respond to Kraft Singles' market share loss to the

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[1] References to the record are abbreviated as follows:

IDF	-initial decision finding
ID	-initial decision
Tr.	-transcript of testimony
CX	-complaint counsel's exhibit
RX	-respondent's exhibit
RAB	-respondent's appeal brief
CAB	-complaint counsel's answering and cross-appeal brief
RRAB	-respondent's reply and answering brief
CRB	-complaint counsel's reply brief

increasing number of lower cost non-dairy imitation and substitute slices that were appearing on the market. The latter were advertised as being both less expensive and more nutritious than dairy slices such as Kraft Singles.[2] IDF 14-18; CX 3, CX 44F. Most advertisements in the "Five Ounces of Milk" campaign focused on the theme that a slice of Kraft Singles has five ounces of milk as an ingredient, while imitation slices use very little milk, or are made predominantly from vegetable oil and water. *See* IDF 19, 21, 26; CX 276. One purpose of the campaign was to educate

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[2] Some background on the products involved is helpful to understanding the issues in this case. Pasteurized process cheese foods, such as Kraft Singles, are subject to a Food and Drug Administration ("FDA") definition and standard of identity that requires a certain minimum level of mandatory ingredients, and permits specified optional ingredients. 21 C.F.R. § 133.173. FDA regulations require that pasteurized process cheese food contain at least 51 percent natural cheese. 21 C.F.R. § 133.173(a)(5). A slice of Kraft Singles contains about 67 to 68 percent natural cheese. IDF 6. Imitation slices can be any combination of ingredients that resembles and can be substituted for pasteurized process cheese food, but they must be labelled "imitation." *Id.* Typically, imitation slices are a combination of water, vegetable oil, flavoring agents and fortifying ingredients. IDF 8. Imitation slices and substitute slices also compete in the individually wrapped process slices category. IDF 7. Imitation slices are, by FDA definition, "nutritionally inferior" to pasteurized process cheese food slices like Kraft Singles even though they may contain more of certain nutrients than their natural counterparts. IDF 9, 216, 218. "Nutritional inferiority" is defined by the FDA as any reduction in the content of any "essential ingredient" that is present in a measurable amount in the food being imitated. 21 C.F.R. § 101.3(e)(4). Substitute slices are cheese slices that do not meet the FDA standard of identity for pasteurized process cheese food slices, but are not "nutritionally inferior" to those slices, and so are not required under federal law to be labelled "imitation." 21 C.F.R. § 101.3(e)(2). Although the complaint refers only to "imitation slices," we interpret this phrase to refer to both imitation and substitute cheese slices. *See* IDF 219.

consumers about the difference in milk content between Kraft Singles and non-dairy slices because Kraft believed that consumers were unaware that the price differential between these products was attributable to differences in ingredient costs. IDF 18.

The "Skimp" ads ran nationally from February 1985 through June 1987, and featured the message that Kraft Singles have five ounces of milk per slice, while imitation slices use "hardly any milk." *See* IDF 23; CX 276. The "Skimp" ads differed from previous executions in the "Five Ounces of Milk" campaign in that they were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to calcium in the ad copy as the key nutritional element. IDF 23-37, 87; *see* CX 276C. Calcium was identified as an example of the nutritional benefit provided by Kraft Singles in order to capitalize on high consumer interest in calcium at the time, and to respond to the increasing number of products, including competing slices, that were being advertised as good sources of calcium. IDF 27.

The "Class Picture/5 ounce" television ads ran nationally from June 1986 through January 1987. IDF 40; see CX 276F. They reflected a different creative strategy than the "Skimp" ads, and were intended to communicate that Kraft Singles are an "excellent source of calcium." IDF 38; *see* IDF 39. Although the "Class Picture/5 ounce" ads stated that Kraft Singles are made from five ounces of milk per slice so they are "concentrated with calcium," these ads are not expressly comparative in that they do not mention imitation or substitute slices. IDF 38.

On June 17, 1987, the Commission issued a complaint alleging that the aforementioned advertisements materially represented, directly or by implication: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency" claim; Complaint ¶ 6), and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim; Complaint ¶8). The complaint alleges that neither of these calcium claims is in fact true (Complaint ¶¶ 7, 9), and further alleges that Kraft represented in its advertisements that it possessed and relied upon a reasonable basis for the challenged representations, when it did not (Complaint ¶¶ 10, 11). The complaint charges that these representations were thus

false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act. The matter was assigned to Administrative Law Judge Lewis F. Parker for hearing. The trial began on July 5, 1988, and ended on November 17, 1988. The record closed on November 29, 1988. The parties filed their proposed findings of fact and conclusions of law on January 10, 1989, and their answers on February 10, 1989. The initial decision and order of the ALJ were filed on April 3, 1989.

The ALJ found Kraft liable for making both of the alleged calcium claims in each of the challenged ad series. ID at 64-65, 69. He found that the claims were material because they involved important health concerns. ID at 70-71. He also found that the claims were objective product claims, and that they were false and unsubstantiated. ID at 69-70. The ALJ's order adopts the relief proposed by complaint counsel in the Notice Order attached to the Commission's complaint, with the exception of the scope of product coverage. He concluded that Kraft did not intend to make the misrepresentations, that there was insufficient evidence of a persistent, long-term pattern of deceptive advertising, and that the order proposed by complaint counsel would expose Kraft to liability in the future for "unpredictable interpretations of its ads." ID at 71-72. Accordingly, he rejected the scope of product coverage proposed in the Notice Order, which would have included "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese," and limited his order to "individually wrapped slices of pasteurized process, imitation or substitute cheese products." ID at 72.

Kraft appeals from the ALJ's initial decision and order. Kraft's principal arguments on appeal are that: (1) neither the ALJ nor, by implication, the Commission can find the alleged implied claims in this case based only on review and analysis of the challenged ads, but must rely on extrinsic evidence; (2) the ALJ erred in finding that, based on the extrinsic evidence in the record, consumers would take the alleged implications from the challenged ads; 3) the ALJ erred in concluding that the alleged calcium claims would have been material to consumers; and (4) the entry of any order based on the ALJ's underlying liability findings would prevent Kraft from engaging in truthful informative advertising for covered products, and would thus be an unconstitutional restraint

on commercial speech. Complaint counsel appeals the narrow scope of product coverage of the ALJ's order.

We affirm liability under Sections 5 and 12 of the FTC Act,[3] although we differ with the initial decision in certain respects, as discussed in this opinion. In particular, we agree that the milk equivalency claim is conveyed by both the "Skimp" ads and the "Class Picture/5 ounce" ads, but we conclude that the imitation superiority claim is conveyed only by the "Skimp" ads. We generally agree with the ALJ's findings and conclusions to the extent they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own. Based on our consideration of the record in this case and the arguments of counsel for both parties, we grant complaint counsel's appeal. The order we adopt inciudes the broader provision for product coverage as set forth in the Notice Order.

Kraft does not appeal the ALJ's findings that the alleged calcium claims are false and unsubstantiated if they are in fact made in the challenged ads. Accordingly, we adopt the ALJ's findings and conclusions on this issue. IDF 211-280; ID at 69-70. Thus, with respect to the milk equivalency claim, we find that a 3/4-ounce slice of Kraft Singles has 70 percent, not 100 percent, of the calcium of five ounces of whole milk, by Kraft's own analysis and admission.[4] With respect to the imitation superiority claim, we

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[3] 15 U.S.C. §§ 45 & 52. Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 prohibits false advertising likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 of the Act defines false advertising for purposes of Section 12 as advertising that is misleading in a material respect. 15 U.S.C. § 55. If an act or practice violates Section 12, it also violates Section 5. 15 U.S.C. § 52(b).

[4] The calcium in Kraft Singles is derived from three dairy sources: natural cheese, whey, and skim milk, with the largest percentage of calcium coming from the natural cheese component. IDF 7. Even though it takes five ounces of milk to make the natural cheese contained in a 3/4-ounce slice of Kraft Singles, that slice contains

(continued...)

find that Kraft Singles contain, on average, 15 percent of the U.S. Recommended Daily Allowance ("RDA") of calcium per ounce,[5] and that the vast majority of imitation slices sold in the United States during the relevant time period also contained 15 percent or more of the U.S. RDA of calcium per ounce.[6] IDF 224, 234-35.

Our analysis of the issues on appeal is presented below.

II. WERE THE CLAIMS MADE?

A. Legal Framework

The Commission will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.[7] *Thompson*

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[4] (...continued)
less than the amount of nutrients found in five ounces of milk due to whey losses associated with cheesemaking and the dilution effect of other ingredients added to the cheese food. Answer ¶ 7; CX 100; *see also* IDF 12, 211, 212.

[5] The U.S. RDA for calcium is 1 gram, or 1000 milligrams ("mg."). *See* 21 C.F.R. § 101.9(c)(7)(iv); Recker Tr. 597-98.

[6] Respondent did not substantiate the assertion that Kraft Singles contain more calcium than most imitation slices. However, respondent presented evidence at trial suggesting that the dairy calcium in Kraft Singles is more beneficial to the body due to the greater "bioavailability" (*i.e.*, the amount absorbed from the gastrointestinal tract into the bloodstream) of dairy calcium relative to the non-dairy calcium in imitation slices. IDF 237-278. The ALJ found that the evidence Kraft presented in support of its bioavailability claim was not convincing. IDF 279. We agree.

[7] This standard is intended to ensure that the flow of useful and accurate product information conveyed to consumers through advertising is not deterred. *See Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984). We note, for example, that a study conducted by the Commission's Bureau of Economics on producer
(continued...)

Medical Co., 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-66 (1984); Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 176-77 (1984) [hereinafter "*Deception Statement*"]. For analytic purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an ad can reasonably be interpreted as containing. Express claims directly state the representation at issue. *Thompson Medical*, 104 F.T.C. at 788. Implied claims are any claims that are not express. They range on a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* at 789.[8] Both express

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[7] (...continued)
advertising of the health benefits of fiber consumption in the ready-to-eat cereal market indicates that such advertising was a particularly effective source of important health information to segments of the population not previously reached by government and general information sources. *See* P. Ippolito & A. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, Bureau of Economics Staff Report, Federal Trade Commission (August 1989).

[8] Advertisements do not necessarily convey one message to all persons, and the same advertising elements may be amenable to more than one reasonable interpretation. Each interpretation is reasonable as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed. *Thompson Medical*, 104 F.T.C. at 789 n.7. An advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Id.* at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Advertisements may also contain a secondary message that tends to support or re-enforce the
(continued...)

claims and implied claims can be deceptive. *See, e.g., Removatron International Corp.*, 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

Advertisers can be liable for misleading consumers by innuendo as well as by outright false statements. *See Deception Statement*, 103 F.T.C. at 175 n. 4, 176-77; *Cliffdale*, 103 F.T.C. at 170-71; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Evidence of intent to deceive is not required to find liability. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977).

The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. While express claims are necessarily self-evident from the ad, implied claims may or may not be apparent. *See Deception Statement*, 103 F.T.C. at 176. We are often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad and the circumstances surrounding it. *Thompson Medical*, 104 F.T.C. at 789, 799; *Cliffdale*, 103 F.T.C. at 164; *Deception Statement*, 103 F.T.C. at 176. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances. *Thompson Medical*, 104 F.T.C. at 789.

If, based on our initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. *Thompson Medical*, 104 F.T.C. at 789; *Bristol-*

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[8] (...continued)
primary message. The secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Deception Statement*, 103 F.T.C. at 178 n.21.

Myers Co., 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Such evidence can include reliable results from methodologically sound consumer surveys. *Thompson Medical*, 104 F.T.C. at 790. The Commission might also consider evidence respecting the common usage of terms, as well as generally accepted principles drawn from market research showing that consumers generally respond in a certain manner to advertisements that are presented in a particular way. *Id.* The Commission can also consider the opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted, if such opinions are adequately supported. *Id.* at 790 & n.11.

In all instances, the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *Deception Statement*, 103 F.T.C. at 176. Whether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it. *Thompson Medical*, 104 F.T.C. at 790. An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *Deception Statement*, 103 F.T.C. at 177 n.20.

B. The Claims

The challenged "Skimp" and "Class Picture/5 ounce" ads do not expressly state the alleged calcium claims, but complaint counsel argue that the ads can reasonably be interpreted as conveying the claims by implication. Kraft denies that its ads make either of the representations specified in the complaint. We examine each of the alleged claims to determine whether consumers acting reasonably under the circumstances would interpret the challenged ads to have made the alleged claims.

1. Milk Equivalency Claim

a. The "Skimp" Ads

The following is characteristic ad copy taken from a television commercial version of a "Skimp" ad:[9]

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her?
> So I buy KRAFT Singles.
> Imitation slices use hardly any milk.
> But KRAFT has five ounces per slice.
> Five ounces. So her little bones get calcium they need to grow.
> No, she doesn't know what that big KRAFT means.
> Good thing I do.
>
> *Singers*: KRAFT Singles. More milk makes 'em ... more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

See CX 62 C & Z-72 (television ad); CX 62 Z-33 (print ad) (reproduced in Appendix A hereto); *see also* Complaint ¶ 5 and Exhibits A-D; IDF 26, 44. The visual portion corresponding to the statement "imitation slices use hardly any milk" shows a small amount of milk being poured into the bottom of a glass. The audio continues, "but Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow." Simultaneously, milk continues to pour into the glass, filling it up to the five ounce mark. The commercial also shows milk pouring into a glass which then animates back onto a package of Kraft Singles, the front label of which displays the phrase "5 oz. milk slice" inside the image of a glass. CX 95.

In January 1986, Kraft ran a revised version of the "Skimp" ads which changed "Kraft has five ounces per slice" to "Kraft is made from five ounces per slice." IDF 28; *see* CX 276F, CX 106. In July 1986, J. Walter Thompson developed several additional

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[9] Each television and print execution was somewhat different, and most were disseminated with a number of variations.

copy alternatives, which Kraft declined to adopt at that time. IDF 89. In March 1987, near the end of the "Skimp" campaign, Kraft made a further change to the text of the ads, adding the disclosure "one 3/4 ounce slice has 70% of the calcium of five oz. of milk" as a superscript in the television commercials and as a footnote in the print ads.[10] IDF 28; CX 276I; *see also* CX 275B.

The ALJ found that the reference in the "Skimp" ad copy to the precise amount of milk in a Kraft Single, together with the reference to calcium, can be interpreted as implying that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk; because there is no mention that calcium is in fact lost in the processing of cheese, the "Skimp" ads convey the milk equivalency claim. IDF 45. He concluded that reasonable consumers would take the net impression of milk equivalency from the language used and its interaction with the various elements in the challenged ads. ID at 63-64. Finally, he found that most of the ads did not try to dispel the impression of milk equivalency, and that the few later ads that contained altered copy ("has" rather than "is made from") or added a disclaimer ("one 3/4 ounce slice has 70% of the calcium of five ounces of milk") were ineffective due to the confusing and inconspicuous nature of these modifications. ID at 64; *see* IDF 57-58, 133.

We agree that each ad in the "Skimp" series, viewed as a whole, conveys an overall net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. Several elements reinforce this impression. The word "has," and the repetition of the precise amount of milk in a Kraft Single -- five ounces -- followed by express reference to a specific nutrient -- calcium -- linked by the causal word "so," suggest that a slice of Kraft Singles contains as much calcium as the five ounces of milk from which it is made. The visual image of milk being poured into a glass up to a five-ounce mark, which is then superimposed onto

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[10] Respondent also claims that a third change was made to the "Skimp" ad copy, *i.e.*, the phrase "so her little bones get calcium" was allegedly changed to "plus her little bones get calcium." *See* RAB at 16 n.14. There is, however, very little record evidence pertaining to this change.

a package of Kraft Singles, further reinforces the linkage between the specific amount of milk ingredient in the product and the product's calcium value, which is mentioned in the audio portion of the television advertisement and in the print ad copy. We agree that no element in the ads successfully dispels this impression.

We also find that the later-added copy modifications and disclosures were ineffective to dispel the net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. For example, the superimposed caption in the television commercials appears briefly in a middle frame in conjunction with another caption ("milk amounts based on cheese content"), and conveys a complicated quantitative message ("one 3/4 ounce slice has 70% of the calcium of five ounces of milk"). Generally recognized marketing principles suggest that, given the distracting visual and audio elements and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure. *See Thompson Medical*, 104 F.T.C. at 797-98 & n. 22; *Deception Statement*, 103 F.T.C. at 180. We conclude, based on our review of the television and print versions of the "Skimp" ads themselves, that they contain elements that are likely to cause reasonable consumers to interpret the ads as claiming that Kraft Singles contain the same amount of calcium as five ounces of milk.

Respondent asserts that the implied claims at issue in this case involve "language which relatively few consumers would interpret as making" the claims at issue, in contrast with the implied claims at issue in *Thompson Medical* and *Removatron*, which were "virtually synonymous" with express claims, and where it was "entirely appropriate to find from a mere reading of the ad copy that consumers were likely to take away those implications." RAB at 19-20. Although Respondent attempts to contrast the Kraft ads with those at issue in *Thompson Medical* and *Removatron*, we view the relevant ads as more comparable than contrasting in that they all contain facially evident elements that indicate the existence of implied claims. For example, in the "Aspercreme" ads, the visual image of two aspirin being replaced by a tube of Aspercreme is similar to the visual technique used in Kraft's "Skimp" ads in which a glass is shown filling to the five-ounce mark with milk. As reinforced by these visual images, the textual passages in the two

advertising campaigns (*e.g.*, "Kraft has five ounces . . . so her little bones get calcium" and "with amazing Aspercreme, you can get the strong relief of aspirin"), place both ads in a very similar position; that is, they both contain implied claims that are close to express.

In addition, the implied effect of some of the statements in the "Skimp" ads were similar to the effect of some of the ads in *Removatron*. Advertisements for the Removatron device stated that it "works toward dehydrating and destroying the papilla, which is the source of nourishment for the hair" and that "further hair growth is prevented." The natural implication from this statement -- that destroying the papilla prevents further hair growth -- is that the hair won't grow back. Similarly, when the Kraft "Skimp" ads proclaimed that a slice of Kraft Singles *has* or *is made from* five ounces of milk "*so* her little bones get calcium" (emphasis added), the causal link of the phrases naturally implied that a Kraft Single has the same amount of calcium as five ounces of milk.

Because we find the evidence from the ads themselves to be sufficiently clear, we find it unnecessary in this case to resort to extrinsic evidence in order to conclude that the milk equivalency claim is made by the "Skimp" ads.[11] We reject Kraft's argument

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[11] Respondent claims that the testimony of six of its witnesses and two of complaint counsel's experts supports the contention that consumer survey evidence is required in this case to determine whether consumers are likely to take the alleged implied calcium claims from the challenged ads. RAE at 20 & n.18. We read the testimony cited by Kraft to say that, as a general matter of methodology, reliable consumer survey evidence is the preferred means of confirming what messages consumers actually take from advertisements and quantifying the degree to which those messages are communicated. We do not find that this testimony establishes that the claims in this case can only be found through consumer surveys, or that no reasonable interpretation of the ads can be made based on evidence from the ads themselves. Where we cannot conclude that an advertisement contains a particular implied message based on our review of evidence from the ad itself, we will give great weight to reliable consumer survey evidence.

(continued...)

that the Commission cannot, as a matter of law, find the implied claims in this case based on evidence from the challenged ads themselves, but must rely of extrinsic evidence."[12] RAB at 3, 5-6, 19-21; RRAB at 7-13. It is well settled that the Commission can determine whether a claim is made in an advertisement without resorting to extrinsic evidence even if the claim is implied. *Removatron*, 111 F.T.C. at 291-96; *Thompson Medical*, 104 F.T.C. at 789; *Cliffdale*, 103 F.T.C. at 166; *Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983). *See also American Home Products Corp. v. FTC*, 695 F.2d 681, 687 & n.10 (3d Cir. 1982); *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Nor do we agree with Kraft that the First Amendment mandates that the Commission rely on consumer survey evidence to find an implied claim that we find evident from elements on the face of the ad itself. RAB at 3, 5-6, 19-21; RRAB at 7-13. In discussing the extent of constitutional protection accorded commercial speech, the Supreme Court clearly has stated that:

> [w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-53 (1985), quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

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[11] (...continued)
Thompson Medical, 104 F.T.C. at 789-90. In this case, we disagree with respondent's overly rigid reading of the challenged ad copy, and find that we do not need extrinsic evidence given the combination of misleading elements clearly present on the face of the ads.

[12] At oral argument, counsel for Kraft appeared to concede that it is the Commission's province to determine whether the existence of the implied claims at issue is subject to interpretation based on evidence from the ads themselves. 12/7/89 Transcript of Oral Argument at 27-30.

We conclude that our review of the evidence from the "Skimp" ads themselves is sufficient to establish that they contain the milk equivalency message. However, because extrinsic evidence has also been offered on this issue, we also considered that evidence. We find that the weight of the probative extrinsic evidence is consistent with our determination that the "Skimp" ads convey the milk equivalency claim to at least some groups of reasonable consumers.[13]

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[13] This evidence includes, but is not limited to, the results of the Market Opinion Research ("MOR") consumer survey (CX 196), which measured consumer reaction to three challenged "Skimp" ads (two television ads and one print ad), and which, after taking into account control group responses, indicate that between 45 percent and 53 percent of survey respondents took the milk equivalency message from the ads in response to closed-ended questions. IDF 99-171; ID 69; *see* IDF 48-52. The evidence also includes the opinion of complaint counsel's expert Dr. David Stewart, who designed and testified about the MOR survey, and whose testimony, in our view, was adequately supported. *See* IDF 48, 71; *see also* Stewart Tr. 1081-82. Although we agree with respondent that the design of the MOR survey questionnaire is not without flaws, and that alternative or additional means could have been used to better minimize the potential for yea-saying bias inherent in using a closed-ended question format, on balance, we find the MOR survey results to be of some probative value.

We have also considered the extrinsic evidence cited by respondent to support a finding that the alleged claims were not made in the ads. *See* RAB at 49-56; RRAB at 49-55. The consumer survey evidence consists of: (1) results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 7; CX 79), and for purposes of this proceeding by Opinion Research Corporation (RX 47); and (2) analyses of the verbatim responses to the MOR survey's open-ended questions by Kraft's experts, Dr. James Heisler and Dr. Leon Kaplan (RX 83; RX 85). *See* RAB at 49 n. 41; *see also* IDF 73-78, 80, 169-172, 175-185. The ASI copy test results relied upon by Kraft in this proceeding derive from a survey methodology

(continued...)

b. The "Class Picture/5 ounce" Ads

The "Class Picture/5 ounce" ads were not part of the earlier "Skimp" campaign, and were executed somewhat differently. The

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[13] (...continued)
designed primarily to measure ad memorability, and not ad communication. As a result, we find that the ASI survey questions did not fully probe for all of the messages, including secondary messages, conveyed by the ads to survey participants. *See* IDF 185. With respect to the survey conducted by Opinion Research Corporation ("ORC"), we again find that the survey questions yielding the results upon which respondent relies were not sufficiently directed to compensate for normal variations in consumers' ability to recall and articulate their impressions on viewing the test ads, and thus did not fully elicit the messages, including secondary messages, received. The ORC results may thus understate the number of survey participants that received the challenged claims from the test ads. *See* IDF 183, 184. We have also considered, but are not persuaded by, the testimony, including expert testimony, cited by Kraft in support of the proposition that the open-ended questions used in the consumer surveys in question did elicit all of the messages taken by consumers. *See* RRAB at 47 n.43, 50 n.46, 51-52 & n.48, 53, 55; *see also* RAB at 54-55. Although there may well be instances where the only reliable extrinsic evidence consists of responses to open-ended questions, that is not the case here. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our reading of the "Skimp" ads. *See Thompson Medical*, 104 F.T.C. at 805 (while results from unaided recall questions supported respondent's position, results from aided recall questions "tell an entirely different story").

We disagree that our conclusion regarding the survey evidence relied upon by respondent in this case creates "intolerable uncertainty for advertisers" who use this form of copy testing in the ordinary course of business. RAB at 56. The quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances, including whether the advertiser was alerted to potentially misleading messages in its ads. *See Thompson Medical*, 104 F.T.C. at 835-36; discussion *infra* at Part V.

visual elements depict a group of school children having their group picture taken. The following is characteristic ad copy taken from the television commercial version of these ads:

> *Announcer (voice over)*: Can you see what's missing in this picture?
>
> Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.
>
> *Photographer*: Say Cheese!
> *Kids*: Cheese!
> *Announcer (voice over)*: Say KRAFT Singles.
> 'Cause kids love KRAFT Singles, right down to their bones.

See CX 275I & CX 62 Z-11 (television ad); CX 62 Z-55 (print ad) (reproduced in Appendix B hereto); *see also* IDF 38. The "Class Picture/5 ounce" ads were disseminated with a superscript that states: "[o]ne 3/4 ounce slice has 70% of the calcium of five ounces of milk." *Id.*; *see also* CX 62 Z-12, Z-13; CX 276F-G; CX 277D.

According to the ALJ, the copy elements that prompted his finding of the milk equivalency claim in the "Skimp" ads were also present in the "Class Picture/5 ounce" ads. ID at 63; *see* IDF 57, 59-60, 134, 165. He concluded that ads containing those elements were likely to give reasonable consumers the net impression of milk equivalency, and that the superscript disclosure was ineffective to correct this net impression. ID at 64. We agree that the "Class Picture/5 ounce" ads contain copy elements substantially similar to the "Skimp" ad elements that convey the impression of milk equivalence. Those elements include juxtaposition of the reference to the five ounces of milk used to make Kraft Singles with the statement "so they're concentrated with calcium," a linkage that is reinforced by subsequent repetition of the reference to calcium. We also find, for the reasons discussed above in connection with the "Skimp" ads, that the superscript disclaimer does not effectively

correct the ad's overall impression. Considering all elements, we conclude that the "Class Picture/5 ounce" ads convey a net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. While this conclusion can he supported by evidence from the ads themselves, we also find that this conclusion is consistent with the weight of the probative extrinsic evidence in the record, including inferences reasonably drawn from the same evidence that supports such a conclusion with respect to the "Skimp" ads.[14]

2. Imitation Superiority Claim

a. The "Skimp" Ads

In examining the "Skimp" ads with respect to the imitation superiority claim, the ALJ considered such characteristic ad copy language as:

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[14] *See* note 13, *supra*; IDF 134, 165. We have also considered the extrinsic evidence cited by respondent as showing that the "Class Picture/5 ounce" ads did not convey the milk equivalency claim. *See* RAB at 49 n.41, 54, 58-59; RRAB at 47 & n.43, 49, 51-52 & n.48. The consumer survey evidence consists of results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 8, RX 128; *see* IDF 73, 81, 172), and by Communication Workshop Incorporated ("CWI") (RX 9, RX 128; *see* IDF 73, 82-85, 173-74). Our conclusions with respect to the ASI survey results and the testimony cited by Kraft are discussed above at note 13. With respect to the survey conducted by CWI, we conclude that the survey questions yielding the results relied upon by Kraft in this proceeding did not probe survey participants sufficiently, under conditions calculated to correct for bias, to provide a reliable measure of the messages, including secondary messages, received by reasonable consumers. *See* IDF 185. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our interpretation of the "Class Picture/5 ounce" ads.

> Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

He also considered the visual elements in the ad that reinforced the ad copy message. The ALJ concluded that reasonable consumers would take away the net impression that Kraft Singles are superior to imitation slices because they have five ounces of milk and the equivalent amount of calcium, whereas imitation slices (which, according to the ad, use hardly any milk) have less calcium. ID 64; IDF 44, 47.

We agree. The imitation superiority message is raised by the express reference to imitation slices in the audio and copy portions of the ads and the use of comparative language ("hardly any," "but"). We find that the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio portion refers to Kraft Singles and states "so her little bones get calcium they need to grow," create a net impression that Kraft Singles contain more calcium than most imitation slices. Since no element in the ads effectively corrects this impression, we conclude that the "Skimp" ads on their face contain elements that reasonable consumers are likely to take as communicating an imitation superiority message. We also conclude that the weight of the probative extrinsic evidence in the record is consistent with our conclusion that one net impression conveyed to reasonable consumers by the "Skimp" ads is the imitation superiority claim.[15]

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[15] This evidence includes, but is not limited to, the MOR survey results which, taking into account control group responses, indicate that between 23 percent and 39 percent of survey respondents took the imitation superiority message from the challenged "Skimp" ad language in response to closed-ended questions (ID at 69; see IDF 161-163, 170-171; see also ID at 69; IDF 92, 95, 184); and the opinion of marketing expert Dr. Stewart (IDF 71; see Tr. 1081-82). We have considered the extrinsic evidence cited by Kraft in support of its contention that the "Skimp" ads do not convey an imitation

(continued...)

b. The "Class Picture/5 ounce" Ads

While the Initial Decision can be read as holding that the "Class Picture/5 ounce" ads also convey the imitation superiority claim, the precise basis for the ALJ's conclusion on this issue is not clear. His general statement that:

> ads containing the same elements . . . are likely to give reasonable consumers the net impression of . . . imitation superiority as charged in the complaint

(ID at 64) is not dispositive. The imitation superiority claim cannot be ascribed to the "Class Picture/5 ounce" ads by relying on the presence of elements found to convey that claim in the "Skimp" ads, because the ALJ found that "[the "Class Picture/5 ounce"] ads were not expressly comparative . . . . [due to the fact that they] did not mention imitations or substitutes." IDF 38; *compare* IDF 47. However, the ALJ did conclude that:

> other valid extrinsic evidence in addition to expert analysis of the ads' language establishes that the challenged messages which I and complaint counsel's experts find in the challenged ads were actually conveyed to consumers.

ID at 65.

The extrinsic evidence cited in the initial decision consists of certain results from Kraft's 1986 Communication Workshop Incorporated ("CWI") copy test (IDF 96), and the opinion of Dr. Deborah MacInnis, one of complaint counsel's marketing experts.[16] IDF 66, 69. The ALJ's conclusion would not appear

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[15] (...continued)
superiority claim, and conclude that this evidence does not outweigh the record evidence that is consistent with our reading of these ads. *See* discussion *supra* at note 13.

[16] No other expert witness besides Dr. MacInnis stated an opinion that the "Class Picture/5 ounce" ads conveyed the imitation superiority claim. Dr. Stewart, who designed the MOR copy test
(continued...)

to rest on the CWI data, however, because he separately concluded that none of Kraft's copy tests, including the CWI copy test, are probative.[17] ID at 69. And while the ALJ found the opinion of Dr. MacInnis generally to be entitled to "substantial respect" (ID at 65), the initial decision does not indicate what conclusion if any he drew from Dr. MacInnis's opinion on this specific issue.

We have reviewed the "Class Picture/5 ounce" ads and are not able to conclude with adequate confidence, by looking solely at the ads themselves, that reasonable consumers would understand them to be claiming that Kraft Singles contain more calcium than most imitation or substitute slices. Such representative ad copy as:

> KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.

contains no explicit comparison between Kraft Singles and non-dairy slices. Instead, the ads make claims only about the attributes of Kraft Singles, and do not contrast these attributes with those of non-dairy slices. Similarly, there are no visual cues that prompt a comparison with other slices. Where an examination of the ads does not provide us with sufficient information to determine whether reasonable consumers take the implied message urged upon us by complaint counsel, we will require extrinsic evidence before concluding that the ads convey the alleged implication. *See Thompson Medical*, 104 F.T.C. at 812; *Sterling Drug, Inc.*, 102 F.T.C. 395, 756-57 (1983).

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[16] (...continued)
which tested three "Skimp" ads, offered an opinion only as to the similarity in ad copy between the tested "Skimp" ads and the "Class Picture/5 ounce" ads as that pertained to the milk equivalency claim. IDF 134, 165; *see* Stewart Tr. 1155-56.

[17] While the ALJ found that reliance on the responses to closed-ended questions was appropriate (IDF 187), and described the one CWI question cited in his findings on this issue as a "closed-ended question" (*see* IDF 96), it is not clear that he intended to except the response to this one CWI question from his general conclusion that Kraft's CWI copy test is not probative.

In this instance, we find the extrinsic record evidence insufficient to support a conclusion that the imitation superiority claim is conveyed by the "Class Picture/5 ounce" ads. Both complaint counsel and the ALJ's findings cite results taken from Kraft's CWI copy test which indicate that 45 percent of the people surveyed took an imitation superiority message.[18] *See* CAB at 73-74; 12/7/89 Transcript of Oral Argument at 48-49; IDF 96. However, we are unable to conclude that this evidence is, on balance, reasonably reliable.[19] We also are not persuaded by

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[18] The CWI copy test surveyed forty participants in one city. CX 54 G-H; CX 36 B. Participants were asked if there was anything "said or shown [in the ad] that makes you think KRAFT Singles is different from other brands of individually wrapped cheese slices." IDF 96; *see* CX 58 Z-3. According to CWI's coding methodology, 45 percent of the participants said that what differentiated Kraft Singles was that they contain more calcium than other individually wrapped cheese slices. IDF 96; *see* CX 57 Z-32. Respondent argues that the 45 percent figure is not an accurate reflection of the messages consumers took from the tested ad, and that it overstates the actual response rate based on the underlying data. RAB 58 n. 45; *see* Simon Tr. 2035-36, 2039; RX 151; RX 128 Z133-Z237; Simon Tr. 2116-18.

[19] No measures were used in the CWI survey to correct for preexisting or inherent survey bias. *Compare Thompson Medical*, 104 F.T.C. at 807-08 (control measures used with both aided and unaided recall questions to minimize bias). The apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers prior exposure to the "Skimp" ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the "Class Picture/5 ounce" ads. *See, e.g.*, CX 34C; CX 136R. We note that the control ads used in complaint counsel's Market Opinion Research ("MOR") survey also received relatively high response rates in support of an imitation superiority message. *See* IDF 126, 131; CX 196, pp. 51,84. The MOR survey results that we find probative, however, are the net

(continued...)

complaint counsel's marketing expert, and find her opinion to be inadequately supported with respect to this issue.[20] *See Thompson Medical*, 104 F.T.C. 790 & n.11.

We therefore conclude that the milk equivalency claim is conveyed by both the "Skimp" ads and the "Class Picture/5 ounce" ads, and that the imitation superiority claim is conveyed only by the "Skimp" ads.

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[19] (...continued)
results derived from the test and control ads together. *See* notes 13 & 15, *supra*; *see also* ID 69; IDF 127-31.

[20] Dr. MacInnis interpreted the "Class Picture/5 ounce" ads as implying that Kraft Singles have more calcium than competing cheese slices. IDF 66; Tr. 117-19. As the basis for her copy analysis, Dr. MacInnis cited both "pragmatic implications" theory, which concerns linguistic constructions that automatically cause listeners to hear more than what is directly asserted, and the corollary concept of "implied slur." Tr. 78, 81, 118-19. According to Dr. MacInnis, by stating that Kraft Singles are concentrated with calcium, the implication is that competing slices are not concentrated with calcium. Tr. 118-19. *See also* Tr. 163-64. However, given the absence of any explicit comparative elements from the "Class Picture/5 ounce" ads, we are unwilling to read an imitation superiority implication into these ads without better evidence that reasonable consumers would be likely to take such a message. *See, e.g.*, *Bristol-Myers Co.*, 102 F.T.C. 21, 326-27 (1983). Dr. MacInnis cited the CWI copy test results, discussed above, as corroborating her analysis with respect to the television commercial version of "Class Picture/5 ounce." Tr. 119, 168-69; *see* Tr. 275, 329. However, nothing in her testimony alleviates our concerns about the reliability of the CWI survey evidence, and thus it does not provide her opinion with adequate support. Dr. MacInnis also referred to empirical research supporting the general principle of "implied slur" in her analysis of the "Class Picture/5 ounce" ad copy. *See* Tr. 80, 83-84, 139-40. However, in this case we find her broad references to such research to be an insufficient basis on which to establish that application of this general principle is appropriate in this particular instance. *See* Tr. 252-68, 275.

C. Kraft's First Amendment Arguments

In addition to the First Amendment arguments discussed earlier in connection with the type of evidence required, respondent also contends that complaint counsel's theory of implied deception violates its First Amendment rights because certain evidence presented in this case would also classify as deceptive several other Kraft Singles ads that were not challenged in this proceeding. Respondent argues that the underlying findings of liability based on the record fail to distinguish meaningfully between lawful and unlawful advertising, thus violating First Amendment principles. RAB at 23, 31-32, 44-49; RRAB at 18-22, 56-57. Specifically, Kraft cites to testimony by complaint counsel's expert, Dr. MacInnis, that two unchallenged ads ("Shopping Dad" and "Tell Me When"), neither of which mention calcium, are deceptive because consumers could infer a milk equivalency claim from the reference to milk made in those ads. RRAB at 18-19; RAB at 23. Kraft also argues that results from complaint counsel's MOR copy test show that the unchallenged control ad used ("Taste of Cheese") conveys both of the implied calcium claims even though it does not mention milk, calcium, or competing products, and cites testimony by complaint counsel's experts in support of this argument. RAB at 25, 32; RRAB at 20-22. Finally, Kraft argues that the ALJ's apparent reliance on the testimony of Dr. MacInnis to find that the non-comparative "Class Picture/5 ounce" ads convey the imitation superiority claim similarly fails to distinguish meaningfully between deceptive and non-deceptive advertising. IDF 66; *see* RAB at 22-23; RRAB at 19-20.

Respondent's arguments, to the extent based on record evidence relating to advertisements not challenged in this proceeding, are without merit. It is no defense to a finding of deception in this case to assert that unchallenged ads might also be deceptive. The Commission is not obligated to challenge in a single proceeding all of the deceptive practices in which a respondent may be engaged. *See, e.g., Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). Moreover, it would be inappropriate to speculate on the likelihood that we would find the unchallenged ads to which respondent refers to be deceptive, since a full record on the potential of those ads to deceive has not been developed and is not now before us. Respondent's argument that the findings in

this case relating to the challenged "Class Picture/5 ounce" ads are unconstitutionally overbroad is also without merit in light of our own findings and conclusions regarding liability with respect to that ad, as discussed in the preceding section.

III. WERE THE CLAIMS LIKELY TO MISLEAD REASONABLE CONSUMERS?

The standard by which advertising is judged is whether it is likely to mislead reasonable consumers; proof of actual deception is not required. *Cliffdale*, 103 F.T.C. at 165; *Deception Statement*, 103 F.T.C. at 176. In this case, having found that certain implied calcium claims are conveyed by the challenged ads, and having adopted the ALJ's findings and conclusions that such claims are false and unsubstantiated, we also conclude that such claims are likely to mislead consumers acting reasonably under the circumstances.

Despite respondent's assertions (*see* RAB at 21-22 & n.21; RRAB at 16-18 & n.14), we agree with the ALJ that it is reasonable to presume that a significant number of consumers are not aware that the calcium in five ounces of milk is reduced or lost during the processing of Kraft Singles, and that they are also not aware that imitation cheese slices may be fortified with calcium.[21] ID at 65 & n. 6; *see* IDF 70. The implied calcium claims in this case are credence claims because consumers cannot readily determine by purchasing and consuming Kraft Singles whether or not they are in fact providing the amount of calcium benefit

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[21] In appropriate circumstances, the Commission can presume that consumers are likely to reach false beliefs about a product because of an omission. *Deception Statement*, 103 F.T.C. at 177. We also agree that the record does not support respondent's assertion that consumers generally would know that processed foods do not contain all of the same nutrients in the same amounts as the ingredients from which they are made (ID at 65; *see* RRAB at 16-17), or that a significant number of consumers were aware at the time the ads were disseminated that imitation cheese slices may be fortified with calcium (ID at 65 & n.6; IDF 70).

implicitly promised.[22] *Thompson Medical*, 104 F.T.C. at 834; *American Home Products Corp.*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982). Therefore, reasonable consumers would not be aware of these facts.

IV. WERE THE CLAIMS MATERIAL?

The Commission will find an advertisement deceptive if there is a claim or omission that is likely to mislead consumers acting reasonably under the circumstances, and the claim or omission is material. *Thompson Medical*, 104 F.T.C. at 816; *Cliffdale*, 103 F.T.C. at 164-165; *Deception Statement*, 103 F.T.C. at 175-76, 182-83. A "material" misrepresentation is one that involves information that is important to consumers, and that is therefore likely to affect a consumer's choice of or conduct regarding a product. Proof of actual consumer injury is not required. *Cliffdale*, 103 F.T.C. at 166 n. 11; *Deception Statement*, 103 F.T.C. at 183. The Commission presumes several types of claims to be material: express claims; implied claims where there is evidence that the seller intended to make the claim; and claims or omissions that significantly involve health, safety, or other areas with which reasonable consumers would be concerned, *e.g.*, those pertaining to a product's purpose, safety, efficacy, or cost. *Thompson Medical*, 104 F.T.C. at 816-17; *Deception Statement*,

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[22] Nor do we find it reasonable to expect consumers to ascertain the accuracy of respondent's calcium claims by comparing the nutrient information provided on the labels of milk, Kraft Singles, and imitation and substitute slices, even though it may be technically possible to do so. *See American Home Products Corp.*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F. 2d 681, 688 (3d Cir. 1982) (disclosure on product label did not cure deception in advertising). A comparison between the calcium content of Kraft Singles and milk would require considerable calculation since the nutrient information on milk cartons is not based on a five ounce serving. *See* CRB at 17 n. 16. Kraft's materiality survey shows that 98 percent of the survey participants did not know how much calcium is contained in five ounces of milk. RX 82E, Z-2.

103 F.T.C. at 182-83. In addition to information that is presumptively material, the Commission may also find materiality based on evidence that the claim or omission is likely to be considered important by consumers. *Deception Statement*, 103 F.T.C. at 183.

The ALJ concluded that the calcium claims in the challenged advertisements are significant health claims and thus presumptively material. IDF 188, 190; ID at 70. He also cited as probative, *inter alia*, evidence that the calcium claims were intended to induce consumers to purchase Kraft Singles, and that Kraft believed that the challenged ad copy contributed in some degree to the increased sales of the product. IDF 90-91, 189, 191-93; *see also* IDF 23, 27, 87. He rejected survey evidence that Kraft introduced to rebut the materiality of the claims, finding that the survey had not presented participants with sufficient response options to reveal all of the ways in which the implied claims at issue might affect consumer conduct with respect to Kraft Singles or alternative products.[23] IDF 194-210; ID at 70-71.

Respondent argues that the ALJ erred by basing his determination on a presumption that calcium claims generally are material, rather than explaining why the specific calcium claims at issue are material. *See* RAB at 61-63; RRAB at 67-70. We agree that the ALJ did not explicitly discuss why the "milk equivalency" and "imitation superiority" claims are independently material. Accordingly, we examine the issue ourselves. We conclude that each of the implied calcium claims in this case is material.

A. Materiality of Milk Equivalency Claim

We find that the milk equivalency claim is material. We agree with the ALJ that the results of Kraft's materiality survey confirm the importance of calcium as a factor in consumers' purchase decisions with respect to the product. Of the survey participants, 71 percent rated "a source of calcium" as an "extremely" or "very

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[23] The ALJ found that another significant fault in the survey was its failure to tell survey respondents that the ads made a claim of milk equivalency, thus providing no basis for a conclusion as to the impact of the claim on consumer behavior. IDF 207.

important" factor in their decision to buy Kraft Singles.[24] IDF 190; *see* RX 82W. Other evidence shows that comparative information about the calcium benefit of products would likely have been considered particularly important to consumers with calcium deficiency concerns, *e.g.*, mothers with children, pregnant women, and postmenopausal women. CX 41C; *see also* CX 78A; Recker Tr. 594-99, 726-30. For example, a January 1985 Kraft consumer survey shows that 52 percent of women surveyed who were purchasers of American cheese slices, and 40 percent of total survey respondents, reported significant personal concern about getting enough calcium. CX 137F-H; CX 33A; CX 303C.

The record shows that Kraft designed the challenged ads to capitalize on consumers' calcium deficiency concerns. *See* CX 32C. The target audience for both the "Skimp" and "Class Picture/5 ounce" ads was identified as female homemakers (aged 25-54) with children. CX 6J; CX 129E. The "Class Picture" ad copy, in particular, played upon the likely concerns of mothers with school-age children. *See* CX 54C; CX 56A. A Kraft analysis conducted to substantiate claims made in an earlier, unchallenged version of the "Class Picture" ads points out that girls aged 9-11, for example, require an additional 92 mg. of calcium per day on average to reach their RDA of calcium. CX 177E; CX 178D. Based on Kraft's analysis, we observe that the 60 mg. difference between the calcium content of five ounces of milk and that of a 3/4-ounce slice of Kraft Singles would account for most of the additional calcium needs of girls in this age group if a five ounce glass of milk were substituted for a slice of Kraft Singles daily. *Accord* Recker Tr. 603-04; CX 327, p. 72. Inasmuch as the calcium equivalency claim would be difficult for consumers to evaluate, consumers would likely rely on the accuracy of the nutritional information implied in the ads. We therefore conclude that the misleading milk equivalency claim was a health claim of importance to reasonable consumers, particularly those segments

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[24] About half of all American households purchase Kraft Singles, the largest selling product in the individually wrapped process cheese food slices category. IDF 13.

targeted by the ads.[25] *Deception Statement*, 103 F.T.C. at 182 n. 46; *see Cliffdale*, 103 F.T.C. at 172, 173.

We find further evidence of materiality in certain conduct by Kraft which suggests that Kraft itself considered that the challenged milk equivalency ad copy helped to induce consumer purchases of Kraft Singles. In October 1985, the Center for Science in the Public Interest ("CSPI"), a consumer group, informed Kraft that it believed the "Skimp" ads conveyed the message that a slice of Kraft Singles had the same amount of calcium and other nutrients as five ounces of milk, and asked that the ads be changed. IDF 88. The chief marketing employee for Kraft Singles recommended that the "Skimp" ad copy not be changed in response to CSPI's complaint, stating as one reason that "[t]he Singles business is growing for the first time in four years due in large part to the copy." CX 63B; *see* IDF 191. Kraft eventually made a slight modification to the challenged "Skimp" ad copy, as discussed earlier, but this change was not aired until January 1986.

In November 1985, an earlier, unchallenged version of the "Class Picture" ads was introduced on a regional test basis to determine its viability as an alternative to the "Five Ounces of

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[25] According to respondent, the testimony of two marketing experts that consumers would always state a preference for a slice of Kraft Singles with 100 percent of the calcium of five ounces of milk over one with 70 percent, all other things being equal, says nothing about whether the difference between these amounts actually matters to consumers. RRAB at 74; *see* Stewart Tr. 1176-78; Jacoby Tr. 3664. We find, however, that in the circumstances of this case, an implicit 30 percent exaggeration of the calcium benefit in Kraft Singles is sufficiently likely to have affected consumers' choices with respect to the product to be considered material. *See* Recker Tr. 603-04, 758; CX 327, p. 72.

Milk" strategy.[26] CX 50; CX 6N-P; CX 67A. This version, known as "Class Picture/4 times" (or "Class Picture/I"), states that "ounce for ounce, Kraft Singles have over four times more calcium than milk," which is a true claim: one ounce of Kraft Singles has at least 4.7 times the calcium of one ounce of milk. CX 178C; CX 98. Subsequently, Kraft developed a version of "Class Picture" which incorporated the "five ounces of milk" message. *See* CX 6 Z-1. According to contemporaneous Kraft documents, both versions of "Class Picture" were intended to communicate that Kraft Singles are good tasting and a good source of calcium, but the "Class Picture II" (5 oz.) version "[d]irectly links calcium claim to 5 oz. of milk claim of the current national campaign."[27] IDF 90; *see* CX 36B; CX 56A.

In January and February 1986, respectively, the FTC and the California Attorney General's Office notified Kraft that investigations had been initiated to determine, *inter alia*, whether Kraft's ads conveyed the milk equivalency claim. IDF 88; *see* CX 286, CX 166. While copy tests conducted in late 1985 (on "4 times") and early 1986 (on "5 ounce") indicated that both versions of "Class Picture" were acceptable alternatives for meeting Kraft's marketing goals (*see* CX 36E), Kraft ultimately selected the "Class Picture/5 ounce" version for national dissemination in June 1986, explaining that this was done to avoid consumer confusion. Feldmann Tr. 1524; *see* CX 62 Z-9, Z-13. Kraft also did not adopt any of several other versions of "Class Picture/5 ounce" print and broadcast copy described in a J. Walter Thompson

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[26] An October 1985 "Creative Review" by J. Walter Thompson stated that "CSPI & competitive complaints have repeatedly threatened long-term use of '5 oz. of milk' claim." CX 6Z. A 1986 "Creative Strategy" stated that "[a]lternative strategy and copy is needed as a back-up to the currently contested advertising," and indicated that the regional test of "Class Picture/4 times" was to "determine viability of this 'non-5 oz.' copy in the event that use of '5 oz.' claim be discontinued." CX 11 B, C, E.

[27] A 1986 "Creative Strategy" stated as objectives: "[c]ontinue to realize benefits of '5 oz. of milk' advertising," and "[m]aximize impact of 'calcium/5 oz.' message on a national basis." CX 11C.

memorandum as "acceptable options which do not imply nutritional equivalence," even though there appeared to be some recognition, reflected in contemporaneous Kraft documents, of a possible "cause-effect relationship between '5 oz. milk' and 'calcium.'" CX 8A; *see also* CX 42; CX 84. We find it reasonable to infer from Kraft's persistence in using the challenged ad copy under these circumstances, and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles.

B. Materiality of Imitation Superiority Claim

We also find that the imitation superiority claim is material. We agree with the ALJ that there is evidence suggesting that Kraft intended the "Skimp" campaign to convey an imitation superiority message.[28] IDF 91, 189. We find this evidence sufficient to

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[28] For example, a December 3, 1984 Kraft Marketing Research "Post Completion Summary" states:

> ACTIONS TAKEN (PLANNED) BASED ON RESEARCH: The "5 oz. of milk" theme will continue to provide the primary support for Kraft Singles differentiation. The next phase creative development will link the end benefits of taste and nutrition to the 5 oz. of milk comparative.

CX 120. A subsequent "Request for Marketing Research," dated January 4, 1985, identifies as the objective of the research on the new "Skimp" commercial:

> Measure the breakthrough and communication of the taste, nutrition benefits linked to the 5 oz. of milk reason why. The spot should communicate calcium as the key nutrition element, and more milk makes 'em good as the summary line. Retention of 5 oz. of milk as a measure of superiority is also key.

CX 122A. A March 28, 1985 Kraft Singles "Creative Presentation" states:

> Kraft Singles is the premium-priced brand in the IWPS category. However, it is not clear to consumers what the

(continued...)

allow us to presume the materiality of this claim.[29] We also agree that materiality is shown by evidence that the challenged ad copy led to increased sales, and find that there is sufficient evidence to infer that the imitation superiority message contributed to the increase in consumer purchases of Kraft Singles at a time when that product was priced about 40 percent higher than imitation slices. *See, e.g.*, IDF 190-192; *Deception Statement*, 103 F.T.C. at 183 & n. 57; *American Home Products Corp.*, 98 F.T.C. 136, 369-70 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982).

We have considered the results of Kraft's materiality survey, and agree with the ALJ's findings that it is insufficiently probative to rebut the evidence in support of the materiality of the milk equivalency claim.[30] IDF 194-210; *see* RX 82. In particular, we

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[28] (...continued)
difference is between Kraft and private label or imitation brands.

> Our current advertising addresses this situation by seeking to convince consumers that Kraft Singles is worth its premium price because of the superior nutritional value in its "5-oz of milk in every slice."

CX 32B.

[29] *See Deception Statement*, 103 F.T.C. at 182 & n. 51, *citing American Home Products Corp.*, 98 F.T.C. 136, 368-69 (1981):

> The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers.

A comparative claim such as this one, which not only describes the contents of the advertised product but also distinguishes that product from competing products, seems particularly likely to be material.

[30] Respondent argues that its materiality survey also demonstrates that the imitation superiority claim is not material because it shows
(continued...)

agree that the limited response options offered to survey participants did not adequately elicit all of the ways in which consumer conduct with respect to the product might be affected by the implied claims at issue. IDF 203, 205, 207-10.

V. SCOPE OF RELIEF

Having found that respondent's ads convey material claims that are false, unsubstantiated and likely to mislead consumers acting reasonably in the circumstances, we affirm the ALJ's conclusion that these ads violate Sections 5 and 12 of the Federal Trade Commission Act, and issue the attached order. The order we adopt differs significantly from the order entered by the ALJ in that we broaden coverage in Part I from "individually wrapped slices of pasteurized process, imitation or substitute cheese products" to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese," as proposed in the Notice order.[31] The final

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[30] (...continued)
that survey participants ranked calcium only seventh out of nine characteristics in terms of importance to their decision to purchase Kraft Singles, and thus, that a calcium superiority claim would not be material to consumers, RAB at 66, 69; RRAB at 77-78. We agree with the ALJ that the survey results confirm the importance of calcium to consumers in their purchase decisions since over 71% of the survey participants rated "a source of calcium" as an "extremely" or "very important" factor in their purchase decision. IDF 190.

[31] The order we issue differs from the ALJ's order in the following other respects: In Parts II, III, and IV of the order, we have made several language changes for clarification purposes. We have also modified the language of Part IV to require Kraft to provide a copy of the order to each of its operating divisions, and to all distributors of any products covered by the order, within thirty days after the order becomes final. Finally, Part V of the order has been amended to require Kraft to file a compliance report with the Commission within sixty days after the order becomes final, as well as at such other times as the Commission may require.

order prohibits misrepresentations about the absolute or comparative content of calcium or any other nutrient in the covered products, and prohibits any such nutrient content claim that is not substantiated by competent and reliable scientific evidence. We are persuaded that an order extending not only to Kraft Singles, but also to Kraft's other cheeses and cheese-related products, is warranted by the record in this case. We disagree that the narrower order entered by the ALJ is sufficient. We therefore grant complaint counsel's appeal.

The ability of the Commission to issue orders containing such fencing-in requirements is well established. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391-92 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1250 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *ITT Continental Baking Co.*, 532 F.2d 207, 223 (2d Cir. 1976); *Litton Industries, Inc.*, 97 F.T.C. 1, 78-80 (1981), *aff'd*, 676 F.2d 364 (9th Cir. 1982). The Commission has wide latitude in fashioning appropriate orders to prevent inventive respondents from pursuing a course of conduct similar to that found to have been deceptive in the past. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). However, the Commission's discretion is subject to two constraints. First, to assure that the order is understood by the violator, the order's provisions must be sufficiently clear and as precise as circumstances permit. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 393; *American Home Products Corp. v. FTC*, 695 F.2d 681, 705 (3d Cir. 1982). Second, there must be a "reasonable relationship" between the remedy and the unlawful conduct found to exist. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Jacob Siegel Co. v. FTC*, 327 U.S. at 613; *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959) ; *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Jay Norris, Inc. v. FTC*, 598 F.2d at 1250-51; *Avnet, Inc. v. FTC*, 511 F.2d 70, 79 (7th Cir. 1975). To ensure that any order requirement bears a reasonable relationship to the unlawful conduct found to exist, the Commission considers the deliberateness and seriousness of the violation, the degree of transferability of the violation to other products, and any history of prior violations. *Thompson Medical*, 104 F.T.C. at 833; *see also Sears, Roebuck &*

Co. v. FTC, 676 F.2d at 391-92; *Litton Industries, Inc.*, 676 F.2d at 370-71.

The ALJ found that while respondent's misrepresentations were not an isolated occurrence, they were an "unintentionally deceptive response to significant competitive pressures." As the record did not evidence past deception, he concluded that there was no persistent, long-term pattern of deceptive advertising. ID at 71-72. We disagree with the ALJ's analysis, and conclude that the violations in this case were sufficiently serious and deliberate to warrant the broader product coverage we adopt in the attached order.

The seriousness of the violations in this case is evidenced by the size and duration of Kraft's misleading advertising campaign. The challenged ads were widely disseminated in print and broadcast media for two and one half years at a cost of more than $15 million annually. IDF 23, CX 34C; *see also* IDF 24-25, 29-36, 40-42; *Thompson Medical*, 104 F.T.C. at 833 & n. 79; *American Home Products Corp.*, 98 F.T.C. 136, 401 (1981), *aff'd*, 695 F.2d 681, 707 (3d Cir. 1982). The seriousness of the violation is also affected by the fact that consumers could not readily judge the truth or falsity of the implied calcium claims. *Thompson Medical*, 104 F.T.C. at 834.

Deliberateness is evidenced by Kraft's persistence in running the challenged ad copy despite repeated warnings from various outside sources that the copy might be implicitly misleading. *See Thompson Medical*, 104 F.T.C. at 834-35. In early 1985, prior to airing the "Skimp" commercials, the ABC television network requested substantiation for the "milk and calcium comparisons for Kraft Singles and imitation slices" that were conveyed in the "Skimp" script submitted for broadcast clearance. IDF 93-94. The record shows that Kraft's response to ABC's repeated requests for substantiation was inadequate and misleading (*see* IDF 93, 94, 235), and that a contemporaneous J. Walter Thompson legal memorandum acknowledged a possible imitation superiority claim and recommended that substantiation efforts be undertaken. IDF 95; CX 283; *see also* CX 165A; CX 226. Additional warnings followed in October 1985 from the Center for Science in the Public Interest, in January 1986 from the Federal Trade Commission, and

in February 1986 from the California Attorney General's Office. IDF 88. At the very least, this pattern of warnings suggests that Kraft knew or should have known that more investigation needed to be done to determine whether its ads were conveying misleading messages, notwithstanding Kraft's initial internal assessment that they were not. Moreover, although respondent was clearly aware of acceptable alternatives to the misleading ad copy, it declined to adopt them.[32] *See* discussion *supra* at Part IV.

Respondent argues that it should be entitled to rely on its own internal analyses of the results from its pre-dissemination consumer surveys. Kraft claims that it reasonably believed, based on its internal analyses, that the challenged ads conveyed no deceptive messages.[33] RAB 56-59, 70-78; RRAB at 56-62; *see* ID 71; IDF 80, 81, 84. However, respondent received repeated warnings from outside sources throughout the challenged ad campaigns, which should at least have alerted it that further inquiry would be appropriate, *e.g.*, copy testing designed to measure whether its ads conveyed the deceptive claims that were alleged. *See*, *e.g.*, *Thompson Medical*, 104 F.T.C. at 835-36 & n.82. While Kraft did take some steps in response to the allegations concerning the ads (*see* IDF 28), it made no attempt to determine whether those steps effectively corrected any implicitly deceptive messages. Feldmann Tr. 1710. *See*, *e.g.*, *Thompson Medical*, 104 F.T.C. at 836. We

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[32] We reject, as a ground for limiting the scope of the order in this case, the ALJ's conclusion that "Kraft could be liable in the future for implied claims which it never intended to make, and could not have predicted it could be found to have made," as well as the evidentiary basis upon which that conclusion appears to rest. *See* ID 72.

[33] Neither the lack of intent nor the existence of good faith is a defense to a Section 5 violation; advertisers are liable for materially misleading claims or omissions that their advertisements convey to reasonable consumers, even if this is done inadvertently. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977); *Southwest Sunsites, Inc.*, 105 F.T.C. 7, 164-65 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

find that Kraft's reliance on its internal evaluation of its pre-dissemination copy test results was not sufficient in the circumstances.

Finally, we find that the violations in this case are readily transferable to other Kraft cheese products, given the general similarity between Kraft Singles and the additional cheese products that would be covered under the final order.[34] *See Thompson Medical*, 104 F.T.C. at 836; *American Home Products*, 98 F.T.C. at 405. Accordingly, this order will apply to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese." We do not find that the lack of a prior history of violations of this type outweighs the factors in support of such product coverage.

Respondent argues that any order entered in this case would chill and thus unconstitutionally restrict nondeceptive commercial speech. RAB at 70-78; RRAB at 56-62. We find these arguments to be without merit. First Amendment protections do not extend to commercial speech found to be false and deceptive. *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 110 S. Ct. 2281, 2287 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*

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[34] Respondent's other cheeses and cheese products include the Cracker Barrel brand cheeses, Philadelphia Brand Cream Cheese, and Velveeta Pasteurized Process Cheese Spread. IDF 2. Respondent was on notice of the potential scope of product coverage we now adopt through the Notice Order attached to the Commission's complaint, and was also aware, through complaint counsel's proposed findings and briefs filed in this proceeding, that the rationale underlying the "ready transferability" argument is an asserted general similarity among Kraft cheeses and cheese products. Respondent has therefore had numerous opportunities, including at oral argument, to dispute the accuracy of this factual assertion, but has not provided any evidence indicating a pertinent distinction that would justify excepting any of its cheeses or cheese products from the order.

of New York, 447 U.S. 557, 563-64 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). In this case, the only categories of commercial speech prohibited under the order would be advertising that is either expressly or implicitly false or deceptive, *i.e.*, unprotected speech that the government is free to restrict. We find that the record in this case establishes a reasonable fit between the violations found and the scope of the order's prohibitions.[35] *See Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3033-35 (1989) (First Amendment does not require use of "least restrictive means" but merely requires that there be a "'fit' between the legislature's ends and the means chosen to accomplish those ends.")

VI. CONCLUSION

For the reasons set forth above, we affirm the Administrative Law Judge's finding of liability, and modify the initial decision as described. An appropriate order is appended.

ISSUED: January 30, 1991

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[35] Also baseless is respondent's concern over possible "astronomical" civil penalties for advertising claims covered by the order that it could not have anticipated would be found misleading. RAB at 49, 71. In any action to enforce the order, the Commission would have the burden of proving that the challenged advertisement violates the order's prohibitions. Furthermore, in considering the appropriate amount of civil penalties on finding liability, a court could consider such factors as the willfulness of the violation and the good or bad faith of the defendant advertiser. Whatever remaining uncertainty the respondent faces with respect to its future conduct is no different from the uncertainty faced by any party under order. *See FTC v. Colgate-Palmolive Corp.*, 380 U.S. 374, 393 (1965).

APPENDIX A [to the FTC Opinion]

"Skimp"

Selected television and print advertisements

J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

TELEVISION COMMERCIAL

CODE NUMBER: KRPS4231	TITLE: "SKIMP/BLUE EYES"
CLIENT: Kraft, Inc.	LENGTH: :30
PRODUCT: Process Singles	STATUS: AS PRODUCED
1/25/85 cal	

VIDEO	AUDIO
CU OF LITTLE GIRL'S FACE. CU OF GIRL PICKING UP PACKAGE OF KRAFT SINGLES. CU OF PITCHER POURING MILK INTO GLASS. IT ONLY FILLS UP PARTLY. MILK CONTINUES TO POUR. IT FILLS UP GLASS FARTHER. SUPER: MILK AMOUNTS BASED ON CHEESE CONTENT KID EATS SINGLES SLICE. BI-PACK OF KRAFT PACKAGE & LITTLE GIRL EATING. © 1985 Kraft, Inc. DISS TO CU OF MILK POURING INTO GLASS WHICH ANIMATES BACK INTO KRAFT PACKAGE. DISS TO KID WITH PACKAGE. SUPER: MORE MILK MAKES 'EM GOOD.	LADY(VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her? So I buy KRAFT Singles. Imitation Slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they nee to grow. No, she doesn't know what that big KRAFT means. Good thing I do. SINGERS: KRAFT Singles. More milk make: 'em...more milk makes 'em good. LADY(VO): Skimp on her? No way.

CX-62 C-9208

10754

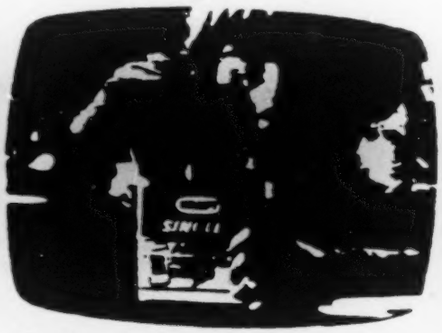
2887

72a

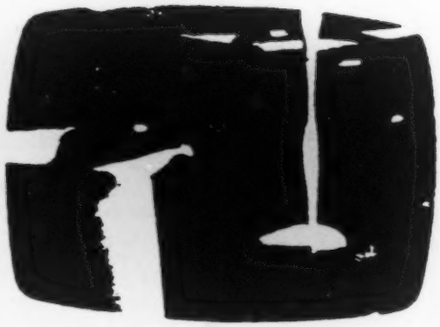
KRAFT PROCESS SINGLES

"Skimp/Blue Eyes" :30

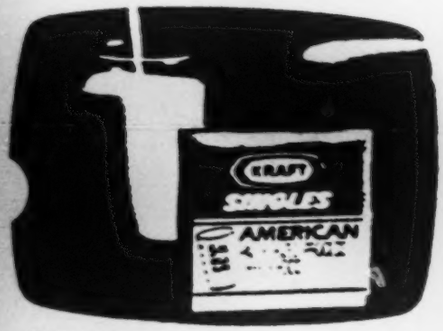
LADY (VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her?



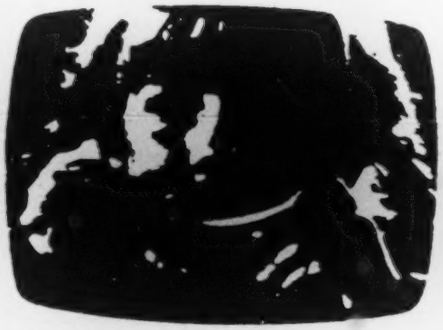
So I buy KRAFT Singles.



Imitation Slices use hardly any milk.



But KRAFT has five ounces per slice. Five ounces.

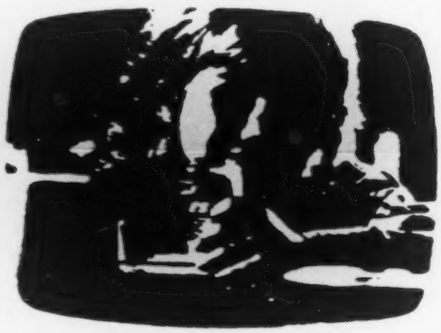


So her little bones get calcium they need to grow.

No, she doesn't know what that big KRAFT means. Good thing I do.

SINGERS: KRAFT Singles. More milk makes 'em...

more milk makes 'em good.



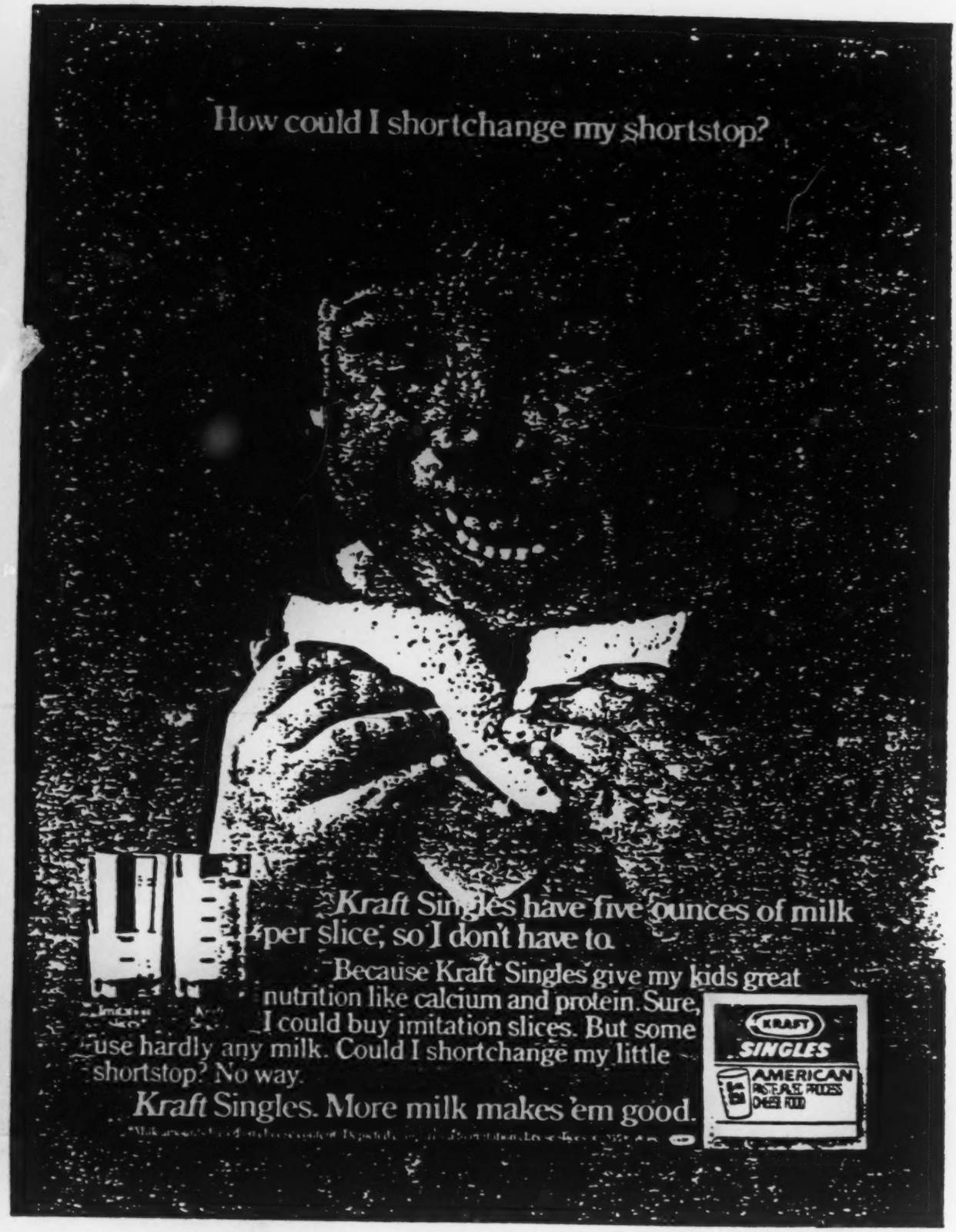
LADY (VO): Skimp on her? No way.

KRPS4231 MARCH, 1985

CX-62 Z-72-4105

10849
2888

73a



Shortstop 143141

Better Homes & Gardens 2/85, 5/85
Family Circle 3/19
Good Housekeeping 3/85
McCalls 5/85
Redbook 3/85
Parents 3/85
Southern Living 2/85, 5/85
True Story 4/85
Women's Day 4/2

CX-62 2-33-9209

10810
2889

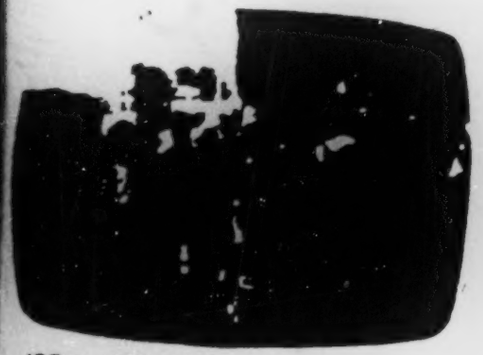
APPENDIX B [to the FTC Opinion]

"Class Picture/5 ounce" ("Class Picture/II")
Selected television and print advertisements

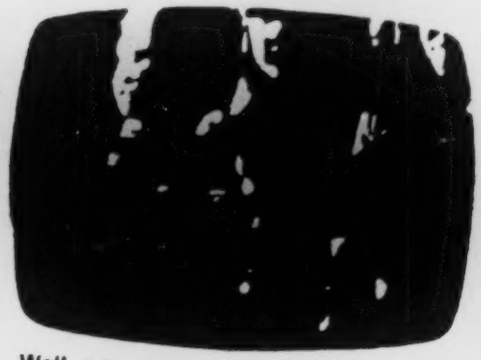
KRAFT

PROCESS SINGLES

"Class Picture/II" :30
(Five ounces Version)

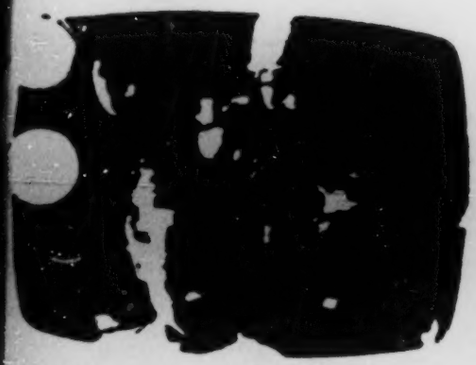


(SFX: MUSIC & KIDS TALKING, UNDER)
ANNCR (VO): Can you see what's missing in this picture?



Well, a government study says

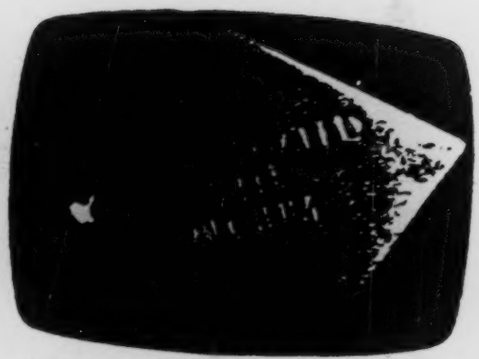
that half the school kids in America



don't get all the calcium recommended for growing kids.

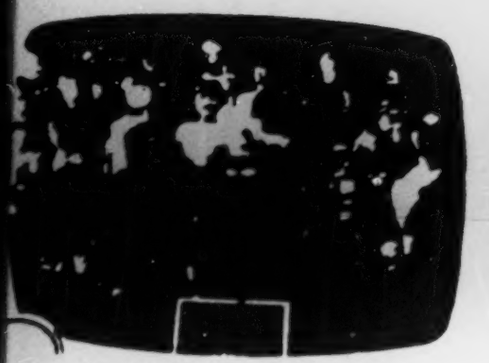
That's why KRAFT Singles are so important.

SUPER: AS PART OF A WELL-BALANCED DIET.



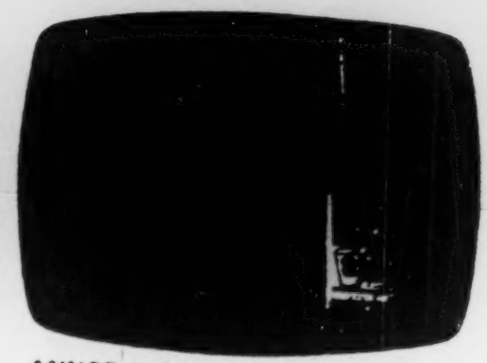
Kraft is made from five ounces of milk per slice. So they're concentrated with calcium.

SUPER: ONE3/4 OUNCE SLICE HAS 70% OF THE CALCIUM OF FIVE OUNCES OF MILK. DEPICTION.



'um the government recommends rong bones and healthy teeth.

PHOTOGRAPHER: Say cheese!
KIDS: Cheese!



ANNCR (VO): Say KRAFT Singles. 'Cause kids love KRAFT Singles, right down to their bones.

CX-275 I4286

2890

KRPS6510 FEBRUARY, 1987

J. WALTER THOMPSON COMPANY

J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

TELEVISION COMMERCIAL

CODE NUMBER: KRPS6510 CLIENT: Kraft, Inc. PRODUCT: Process Singles kq 6/2/86	TITLE: "CLASS PICTURE/II" LENGTH: :30 STATUS: AS PRODUCED

VIDEO	AUDIO
KIDS GETTING THEIR SCHOOL PICTURE TAKEN.	ANNCR(VO): Can you see what's missing in this picture? Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important.
CU OF KRAFT SINGLES PACKAGE. SUPER: AS PART OF A WELL-BALANCED DIET. SUPER: ONE 3/4 OUNCE SLICE HAS 70% OF THE CALCIUM OF FIVE OUNCES OF MILK. DEPICTION.	KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommend for strong bones and healthy teeth.
TWO SLICES PUT ON BREAD. DISSOLVE TO KIDS. PHOTO IS TAKEN. PHOTO OF KIDS IN FRAME WITH PACKAGE IN FRONT.	PHOTOGRAPHER: Say Cheese! KIDS: Cheese! ANNCR(VO): Say KRAFT Singles. 'Cause kids love KRAFT Singles, right down to their bones.

CX-62 2-11-9208 10788

© Kraft, Inc. 1986

2891

77a

Half of these kids have a deficiency no one can see.

50% of America's children aren't getting their recommended dietary allowance of calcium. A government study has uncovered some startling facts. Half of America's children have diets that don't meet the calcium recommendations of the U.S. Food and Nutrition Board. And that's not good.

Because calcium is essential to your children during their growth years, when bones and teeth are developing rapidly. An adequate calcium level helps keep your child's bones growing straight and sturdy. And helps make sure new teeth grow in strong.

***Kraft* Singles are an excellent source of calcium.** In fact, *Kraft* Singles are made from 5 ounces of milk per ¾ ounce slice, so they're concentrated with calcium.*

Include *Kraft* Singles as a part of your children's well-balanced diet. You'll feel better knowing they're getting calcium recommended for strong bones and healthy teeth.

Kids love *Kraft* Singles, right down to their bones.

172060 Class Picture

Family Circle 4/14

CX-62 Z-55-9208

10832

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APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

AGENCY JUDGMENT
With Oral Argument

Date: July 31, 1992

BEFORE: **Honorable** Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Thomas J. Curran, District Judge*

No. 91-1691

KRAFT, INCORPORATED,
Petitioner

v.

FEDERAL TRADE COMMISSION,
Respondent

Petition for Review of an order of the Federal Trade Commission
No. #9208

This cause was heard on the record from the Federal Trade Commission, and was argued by counsel.

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* The Honorable Thomas J. Curran, District Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

(1064-041692)

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the petition to set-aside the Commissioner's order is DENIED and the order is ENFORCED, with costs, in accordance with the decision of this court entered this date.

APPENDIX D

. Sections 5, 12 and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52 and 55)

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) **Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade**

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless-

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect-

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such

method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question

was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

* * *

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

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§ 52. Dissemination of false advertisements

(a) Unlawfulness

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement --

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

* * *

§ 55. Additional definitions

For the purposes of sections 52 to 54 of this title --

False advertisement

(a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

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APPENDIX E

Section 43(a) of Lanham Trade-Mark Act (15 U.S.C. § 1125(a))

§ 1125. False designations of origin and false descriptions forbidden

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.